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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 24

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD OIL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 5495-5502) is reported at 233 F. 2d 649. The majority and dissenting findings of the Federal Trade Commission, before and after this Court's remand, appear respectively at R. 5161-82; 5257-69; and R. 5364-90, 5393-5421. The Hearing Examiner's Report appears at R. 5047-5128.

JURISDICTION.

The petition for certiorari was filed on September 28, 1956, and certiorari was granted on December 17, 1956 (R. 5504). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

The essential matter at issue concerns the correctness of the Court of Appeals' unanimous decision, in accord with the detailed findings of the Hearing Examiner, that the record "firmly established" that respondent's lower prices were made in good faith to meet the equally low price of a competitor (R. 5502).

In so holding, the Court of Appeals decided that the record affirmatively disproved the existence of any pricing system. The court held that the record "affirmatively demonstrates to the contrary," since respondent "sold invariably at its uniform tank wagon price except when at different times it reduced its price to meet competitive offers in order to retain a customer" (R. 5501). Accordingly, the legal status of discriminatory pricing systems, asserted by petitioner as the issue, is actually not presented in this review.[1]

Related questions are whether asserted knowledge by respondent that its lower prices (1) could not be cost-justified, and (2) would cause competitive "injury", can, as a matter of law, defeat its meeting competition defense.[2]

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1. The Question Presented by the Commission hypothesizes a meeting competition defense tendered by a seller to justify a regularly granted "discount" pursuant to its "inherently discriminatory" pricing policy "on the ground that some of the seller's major competitors employ the same pricing policy" (Br., p. 2). But respondent never rested its defense on such grounds (pp. 45, 71-76 *infra*), its defense was not sustained by the Examiner on such grounds (pp. 7-9 *infra*), nor did the decision below turn on such grounds (pp. 14-15, 24-28 *infra*).

2. Respondent agrees that the validity of the Commission's cease and desist order, which the Court of Appeals had no occasion to adjudicate, is not now here (Pet. 8 n. 2; Br., p. 59). However, respondent does not waive the serious questions as to this modified order. See Brief for Petitioner before the Court of Appeals, p. 26 *et seq.*

STATUTE INVOLVED.

Section 2(a) and (b) of the Clayton Act, as amended by the Robinson-Patman Act, in pertinent part provides:

"(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: • • • *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade. • • •

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his

lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. § 13(a)(b) (1952).

STATEMENT.

At the time of the issuance of the Commission's complaint in 1940, respondent supplied several hundred dealer-customers in Detroit at its uniform tank wagon price, and sold to four "jobber" customers at its 1½¢ per gallon lower tank car price. At different times over the years, respondent had been compelled by competition to grant a competitive tank car price to these customers, after they had acquired bulk storage facilities, enabling them to receive gasoline in large tank car lots, and tank wagon delivery equipment, enabling them to supply service stations in tank wagon quantities. These customers, in other words, undertook to perform the various distributive operations known in the industry as the "jobber" function.

Competitors repeatedly solicited respondent's customers with offers of gasoline at lower prices. Having lost three other jobber customers through such competitive offers, respondent determined to defend itself by meeting its competitors' price offers in order to hold these four accounts. The resulting lower prices granted by respondent in self-defense to these individual customers after 1936 were challenged in the Federal Trade Commission's complaint as price discriminations violating the Robinson-Patman Act.

This review concerns the Court of Appeals' unanimous decision holding on the facts that respondent's lower prices were "made in good faith to meet an equally low price of a competitor", and that respondent had fully established its statutory defense under Section 2(b).

The Court of Appeals set aside the FTC order which had been entered by a divided Commission in 1953 subsequent to remand from this Court. That remand followed the 1951 decision in which this Court overruled the original position of the Commission majority that the meeting competition defense was not available whenever asserted competitive "injury" was present. Respondent's meeting competition defense was rejected this second time by the Commission majority notwithstanding its concession that respondent "was convinced" and "had substantial reasons for believing" that "it would lose these accounts" unless it granted the lower prices (R. 5388).

The Commission majority thus maintains that respondent had no choice but to let these customers go to its competitors.

The Essential Facts.

The Commission's complaint filed in 1940 challenged respondent's prices to four specified Detroit customers as discriminatory in violation of the Robinson-Patman Act (R. 3). The Examiner who presided over months of hearings filed a comprehensive Report in 1943 detailing the salient facts (R. 5047-5128). He framed the contested issues (R. 5054-56), summarized the relevant data in the voluminous record, reached specific Conclusions of Fact, and resolved each legal issue by reference to these factual findings. Although he acceded to the Commission's original legal theory—later overruled by this Court (R. 5320)—that the presence of so-called competitive "injury" made the Section 2(b) defense unavailable to respondent as a matter of law, the Examiner concluded that respondent's defense was established factually (R. 5096, 5104-5, 5125).[3]

3. The Commission's brief implies (p. 24 n. 11) that the Examiner, although finding that respondent's prices were made to meet competition, omitted to find that this was done in "good

Respondent was "set up primarily and fundamentally on a tank-wagon distribution basis" in Detroit, and typically delivered gasoline from its six bulk plants in the area to retail service stations in tank wagon quantities (R. 2623, 108-9).[4] Only four of respondent's approximately 360 Detroit customers purchased at the jobber tank car price. One commenced to buy on this basis in 1929, another in 1932, a third in 1935, and the last in 1938 (R. 5059-60)—in each case under circumstances where respondent was compelled to sell in tank car quantities at a tank car price or lose a long-time customer to a competitor.[5] Respondents could not hope to retain these four customers unless it granted them the tank car price (R. 1086, 1291-92, 1300, 1310, 1893).

The four Detroit jobber customers, Ned's Auto Supply Company, Citrin-Kolb Oil Company, Wayne Oil Company, and Stikeman Oil Company, had sold respondent's gasoline for many years.[6] Ned's, a family enterprise,

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faith." But the Examiner's Report itself is clear in resolving in respondent's favor the "Sixth Question" as to whether the prices at issue were "made in good faith to meet equally low prices of competitors" (R. 5099, 5104-5); the minority Commissioners on two separate occasions expressly adopted the Examiner's findings that respondent's lower prices were made in good faith to meet competition (R. 5420, 5264); the Court of Appeals so understood twice (R. 5294, 5299-5300, 5497, 5502); and this Court observed in 1951 that the Examiner had "found the necessary facts to sustain the seller's defense" (R. 5315).

4. Respondent's Detroit retail dealers took delivery in 700-800 gallon tank wagon lots, and paid respondent's uniform tank wagon price in Detroit (R. 5058, 112). Contrary to the Commission's brief (p. 4 n. 2), retailers of Standard's gasoline frequently also handled a competing brand (R. 222, 266).

5. See pp. 7-9, 31-39 *infra*. At various times in the past respondent had three other jobber customers in Detroit, which, despite respondent's sales to them at the tank car price, went over to competitors who offered more favorable prices (R. 1912-16).

6. Both Wayne and Stikeman functioned essentially as wholesalers, not in competition with respondent's retail customers in Detroit. Wayne operated no retail service stations until 1939, and thereafter only on an "emergency" basis when it could not find a lessee for its station properties (R. 398, 5059). Stikeman had no retail operations since 1938 (R. 5060).

had purchased respondent's gasoline as a retailer since 1918. Even though Ned's at least since 1930 "had received offers from responsible companies handling branded gasolines comparable in quality to those furnished by respondent at substantially lower prices" (R. 5093-94, 1800-14), it was refused any price reduction by respondent until 1936. In that year Ned's received a ½¢ per gallon reduction when respondent finally yielded to an "ultimatum" stating that Ned's had "definitely decided" to accept a competitive offer unless it "got a better deal from the Standard Oil Company" (R. 5093-94, 1813). After a second "ultimatum" in 1938 threatening that otherwise Ned's "would quit purchasing from respondent and accept a competitive offer" (R. 5100-1, 1819-20), respondent agreed to sell to Ned's in tank car quantities at 1½¢ per gallon below respondent's tank wagon price.

Citrin, a retailer customer of respondent since approximately 1922, after first talking with another supplier and then negotiating for weeks with respondent, obtained its 1½¢ lower tank car price in 1929 (R. 5060, 1253-55, 265).[7] Subsequently Citrin received intermittent competitive offers for gasoline at equally low or lower prices than respondent's tank car price (R. 5102-3, 1260-1303). In one instance in 1936, a contract with a competing supplier at more favorable terms was actually drawn up and executed. Although Citrin was finally dissuaded from consummating the deal, respondent necessarily kept Citrin at its tank car price (R. 5103, 1282-92).[8]

7. Thereafter Citrin operated largely as a wholesale distributor, and only sporadically operated retail stations when no lessee was available (R. 5060, 1275-76, 859).

8. Stikeman, organized in 1931, had switched its business temporarily when offered a better tank car price by a competitor (R. 2013), and respondent obviously could get Stikeman back only as a tank car buyer and by meeting that price. Wayne originated as a retail service station operator in 1931 supplied by respondent at its tank wagon price (R. 378, 404, 982-4), and for two years sought

Respondent in each instance only reluctantly departed from its uniform tank wagon price in Detroit, and never granted any reductions greater than 1½¢ per gallon. It preferred to, and actually did, lose customers to competitors rather than grant any greater concessions.[9] Furthermore, respondent would rather lose an account than grant this maximum 1½¢ reduction unless the customer acquired his own bulk storage plant and trucks—permitting delivery by respondent in tank car lots averaging 8,000-12,000 gallons, as contrasted with the average 700-800 gallon deliveries to tank wagon customers (R. 112, 122),—and demonstrated a substantial volume of business and adequate credit responsibility (R. 5058, 2086, 1891-97, 118-19). To this extent the 1½¢ reduction was offset by the customer's required expenditure in the acquisition and maintenance of plant and equipment and his performance of the wholesaling operation which respondent itself undertook for its tank wagon customers (R. 951, 1013-16, 1031, 1895-97).[10] These tank car customers were classified as "jobbers" by respondent and accredited as such by the Michigan licensing authorities (R. 5059).[11]

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the price reduction that respondent finally granted late in 1935 (R. 379, 983-4), after Wayne purchased Pure gasoline at 1¢ per gallon under respondent's tank wagon price (R. 5101, 1156, 985, 404).

9. (R. 1912-16.) The 1½¢ per gallon spread between tank car and tank wagon deliveries was typical of respondent's prices during the relevant period, although the differential narrowed to 1¼¢ and even 1¢ at times in 1938 and 1939 (R. 5140, 4872). Respondent's 1½¢ price differential was the smallest quoted to tank car buyers by any supplier; other suppliers sold at a wider differential (R. 1890, 1064, 951).

10. See p. 63 *infra*.

11. This conservative exercise of respondent's statutory right to meet competition also furnished the basis for the "alternate affirmative defenses" asserted in its answer: that its challenged prices were granted pursuant to an appropriate functional customer classification; and also were cost-justified in view of the tank car buyer's assumption of the costs of performing the jobber function (R. 12-14, 16, 5050-51); pp. 45-47, 59 *infra*.

The Examiner's Findings Sustaining the Meeting Competition Defense.

The Examiner found that respondent throughout the period at issue was faced with the alternative of losing the four customers or continuing to grant the lower prices (R. 5104, 5121-22). As the Examiner reported respondent's uncontroverted testimony, they "buy on a day to day basis," and "the jobber market is subject to intense competition and frequent attempts by Standard Oil Company's competitors to proselyte accounts by offering more advantageous terms and service." They "could purchase from many other sources, immediately, a gasoline of comparable quality and at a better price than they are paying at the present time" (R. 5104).

Accordingly, the Examiner concluded as a fact that respondent's ½¢ per gallon reduction to Ned's between 1936 and 1938 "was made to meet an equally low or lower price of a competitor or competitors for branded gasolines of comparable grade and quality and to retain Ned's Company's business" (R. 5096, 5121); and that respondent's 1½¢ lower tank car price, obtained by Ned's after 1938 and by the three other customers before, was "at all times granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality" (R. 5104, 5122).[12]

The Commission's Original Assumption That the Defense Was Established.

In its original ruling in 1945, the Commission evidently conceded the factual sufficiency of respondent's meeting

12. The Examiner, although finding respondent's defense factually established, acceded to the Commission's legal theory that proof of competitive "injury" ruled out the meeting competition defense (R. 5105, 5125).

competition defense, but nullified its force by resort to the novel legal theory which this Court later reversed. Commission counsel expressly waived the factual issue in oral argument before the Commission.[13] The Commission's report declared that "even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense" in view of the finding of competitive "injury" on the customer level (R. 5179).

The Commissioner writing the dissenting opinion stated that "the respondent proved that it had granted a lower price in good faith to meet a competitor's price. The trial examiner who heard the case so held, and I as a Commissioner would so find."[14]

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13. Respondent in argument on motions for reconsideration in 1946 pointed out that reversal of the Commission's legal theory "must inevitably result in the dismissal of the complaint in this case, because proof adduced by the respondent on the point of self-defensive meeting of competition stands uncontroverted on this record." FTC counsel acknowledged that "apparently no evidence controverting it was offered. Desiring to test the legal status of such defense, the Commission found that it was not material as a matter of law whether such defense could be sustained as a matter of fact under the circumstances of this case. Accordingly, it made no finding on the factual question. *The result, I suppose, is the same as though the existence of the respondent's good faith to meet an equally low price of a competitor had been conceded.*" Transcript of Oral Argument before FTC, pp. 16-17, 101 (April 25, 1946). (emphasis added throughout.)

This waiver concerning the factual sufficiency of respondent's defense was avowedly designed and admittedly essential to permit a judicial determination of the Commission's novel construction of Section 2(b). *Id.* at 101-2. Also in this connection, in *A. E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F. 2d 453, 456 (7th Cir. 1943), the Commission was directed to rule on the sufficiency of such a tendered defense.

14. As he put it, "In the instant case, the respondent, having lost two customers because it would not meet the prices of its competitors, made up its corporate mind to hang on to what business it had left, and in good faith, and what appears to me only ordinary common sense, lowered its price to that of its competitors" (R. 5264).

The Defense Deemed Established on First Judicial Review.

On the first judicial review of this proceeding in 1949, the Court of Appeals confirmed that

> "There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that [respondent] made its low price to Ned's, Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor" (R. 5294).

The court also observed that

> "The showing made here by [respondent] that it made the lower price in good faith to meet competition, we assume, *as the Commission apparently did*, was made out. The effect of it was to rebut the prima facie case made by the Commission's proof of [respondent's] discriminatory prices. If nothing further appeared in this record, the case might well have ended there" (R. 5299).

But the court agreed with the Commission "that the showing of the [respondent] that it made the discriminatory price in good faith to meet competition is not controlling" due to the finding of competitive "injury" at the retail level (R. 5300).

This Court's Reversal of the Commission's "Injury" Theory and Remand for Findings:

That legal interpretation was reversed in 1951 by this Court which construed the "meeting competition" defense as "absolute" irrespective of asserted competitive injury (R. 5320-21). Proof of such "injury" being a jurisdictional prerequisite to any prima facie violation of the Act, the Court declared that the Commission's doctrine would leave the meeting competition proviso with "such little, if any, applicability as to be practically meaningless" (R. 5320).

The Court commented on respondent's "evidence tend ing to prove that its tank car price was made to eac 'jobber' in order to retain that 'jobber' as a customer an in good faith to meet a lawful and equally low price o a competitor" (R. 5311), and specially noted that "th trial examiner for the Commission in the instant case ha found the necessary facts to sustain the seller's defens and yet the Commission refuses, as a matter of law, to giv them consideration" (R. 5315).[15] The case was remande for "a Finding as to Whether or Not [Respondent's] Pric Reduction Was Made in Good Faith to Meet a Lawf Equally Low Price of a Competitor" (R. 5311).[16]

The Commission's Post-Remand Rejection of the Defens

Upon remand, a 3-2 Commission majority in 1953 on th identical record once again rejected respondent's mee ing competition defense.[17] The Commission did not direct

15. The dissenting opinion also acknowledged that "the el ments" of respondent's defense are "likewise admitted" (R. 5329

16. At the close of oral argument, the Court requested Comm sion counsel to inform it as to the status of proceedings again some of respondent's Detroit competitors. The three complaints whose pendency the Commission advised the Court in a Mem randum filed on October 13, 1950, were dismissed by the Comm sion on April 3, 1957, on motion of its staff. See pp. 19, 56 *infr*

While counsel urge that respondent's tank car price was never price "reduction" (Br., pp. 26, 29), this Court's prior opini throughout viewed respondent's lower prices as reductions—me prominently in the above-quoted caption of part III of the opinio

17. At that time, the same majority also recommended statuto revision, and advised Congress on March 16, 1953 that the law interpreted by this Court in the instant case was "too weak to me the problem to which the Robinson-Patman amendment was or inally addressed."

The persistently negative FTC attitude toward the "meeti competition" defense has been criticized by numerous commen tors. Dirlam & Kahn, *Fair Competition: The Law and Econom of Antitrust Policy*, p. 122 (1954) ["effort of the F.T.C. to emas late this protective clause"]; Shniderman, *Federal Trade Comm sion Orders under the Robinson-Patman Act*, 65 Harv. L. Rev. 7

challenge the fact findings of the Examiner in respondent's favor. Significantly, in the face of this Court's remand, the Commission did not refer in any way to the legality of the competitive offers met by respondent. The majority conceded that respondent "was convinced" and "had substantial reasons for believing" that "it would lose these accounts" if it ceased granting the lower tank car price (R. 5388).

But respondent's meeting competition defense was rejected this time by reason of its alleged knowledge that its prices would create competitive "injury" (R. 5389),[18] and its inability to cost-justify (R. 5389). The Commission also, for the first time in the case, purported to discover a "policy" or "method," assertedly used by respondent's competitors as well, pursuant to which the prices were said to be made (R. 5389).[19]

The two minority Commissioners, on the basis of an independent review of the record and the Report of the

752 (1952) ["considerable hostility"]; Note, *Functional Discounts Under the Robinson-Patman Act*, 67 Harv. L. Rev. 294, 298 (1953) ["unsympathetic attitude"]; Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, ABA Antitrust Law Section Proceedings, pp. 60, 73 (Sept. 1952) ["notorious history"].

18. Rather than an "extraordinary assertion" on respondent's part that these considerations constituted the first two grounds of the post-remand ruling (Com. Br., p. 56 n. 35), the primacy in the Commission majority's mind of the competitive "injury" ground was publicly reaffirmed by one of the three majority Commissioners. He testified that it was essentially the presence of competitive "injury" which prompted the post-remand rejection of respondent's meeting competition defense. Testimony of Stephen Spingarn, in *Hearings before the House of Representatives Select Committee on Small Business on Price Discrimination, The Robinson-Patman Act and Related Matters*, 84th Cong., 1st Sess. 853 (Nov. 1955).

19. The majority findings disposed of the numerous competitive offers quoted to respondent's customers by ignoring some, disparaging others as involving gasoline of lesser public acceptance, and disqualifying the rest as stemming from the similar pricing "policy" or "method" of competitors. See discussion at pp. 40-44 *infra*.

Examiner, found that "The respondent's price reduction was made in good faith to meet a lawful equally low price of a competitor" (R. 5420-21, 5393). In the words of the Commissioner writing the elaborate minority opinion, "the record convinces me that the respondent—*in meeting some competitor's prices*—and *in refusing to meet the prices of others*—acted as a reasonable prudent person would have acted under the circumstances" (R. 5420).[20] He also observed that "there is nothing in the 8,000 pages of evidence in this record which might cause me to suspect that the respondent knew, or that it had reason to believe, that the competitor's lower price which it was meeting was or might have been unlawful" (R. 5420).

The Court of Appeals' Approval of the Defense as "Firmly Established."

Under review now is the unanimous decision of the Court of Appeals holding respondent's meeting competition defense "firmly established," and setting aside the Commission majority ruling as untenable legally and factually (R. 5501-2). The court observed that "the Commission does not expressly repudiate the findings of the Examiner in the original proceeding that [respondent's] reduction in price was granted to meet the equally low prices offered by competitors" (R. 5498), and saw "no dispute as to the evidentiary facts as found by the Examiner in the original proceedings" (R. 5497).

The court set aside, as factually unsupported and contradicted by the record, the Commission's newly developed theory that respondent's prices were granted pursuant to a preconceived discriminatory pricing "method" and "policy." The court was "unable to discern any basis for the assertion that [respondent's] prices were not

20. Emphasis in original.

the result of departures from a non-discriminatory price scale.'" In the court's view, "The record affirmatively demonstrates to the contrary" (R. 5501).

The court referred to the "bargaining and haggling which took place" as "hardly consistent with the Commission's theory that prices were reduced pursuant to a system" (R. 5501). The court also noted that respondent's "reluctant grant of a ½¢ reduction in 1936, increased to 1½¢ in 1938 in response to an 'ultimatum' by Ned's, would appear to dispel completely any idea that such reduction in price was systematic, as urged by the Commission" (R. 5501).[21]

Lack of cost justification and alleged knowledge of competitive "injury," the first two specific reasons cited in the Commission's report as invalidating respondent's defense (R. 5389), were disapproved as a matter of law. Failure to cost-justify, the court noted, could not defeat the alternative statutory defense of meeting competition (R. 5499). The injury contention was dismissed by the court as reflecting the very reasoning rejected by this Court's 1951 decision (R. 5498-99).

The court also remarked "that in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful" (R. 5501).

And since the court found that respondent's practice of lowering its price to meet competition in individual instances was equally valid under the Robinson-Patman tests, before as well as after that statute amended the Clayton Act in 1936, it disapproved the further claim that respond-

21. Significantly, the Commission majority's report had not used the term "system." Counsel's appellate brief first adopted the term in support of an analogy to the cases condemning industry-wide geographic pricing systems.

ent was obligated to revise its pricing at that time (R. 5499).[22]

The Issues Here.

Before this Court, Commission counsel's argument focuses on the "admissions" of a pricing system allegedly contained in respondent's 1941 answer to the Commission's complaint.[23] Although no "admissions" had hitherto been claimed by the Commission in fifteen years of litigation, counsel now take the position that "the Commission's findings of fact rest almost exclusively on these 'judicial' admissions" of a pricing system, and "do little more than rephrase these admissions." (Br., pp. 18, 38-39).[24]

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22. The Commission (Br., pp. 52-58) disputes the court's statement that "If [respondent's] pricing policy was lawful prior to the amendment, the same policy was lawful afterward" (R. 5499). This Court's prior opinion stated that under the Clayton Act respondent's evidence, "if accepted, would have established a complete defense to a charge of unlawful price discrimination," and viewed the precise issue to be "whether the amendments made by the Robinson-Patman Act deprived those facts of their previously recognized effectiveness as a defense" (R. 5312-13). The court below did not misconceive the well-known changes in the law wrought by the 1936 amendments, for none of these have any bearing on the issues presented by the record at bar. As this Court said, the 1936 change "restricts the proviso to price differentials occurring in actual competition" and "excludes reductions which undercut the 'lower price' of a competitor. None of these changes, however, cut into the actual core of the defense. That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price" (R. 5313-14).

23. The Commission's brief repeatedly quotes excerpts from respondent's alternative defense of functional customer classification to spell out a pricing system (pp. 5, 18-19, 38-39, 43), and reprints as an Appendix those paragraphs of the answer. To permit a fair evaluation of respondent's alternative defenses, respondent has reprinted in Appendix A at pp. 71-76 *infra* the parts of its answer relating to its meeting competition defense, which rests entirely on lower prices in individual instances to retain old customers solicited by competitive offers.

24. This assertion renders redundant the months of hearings, years of litigation, and volumes of record which bring

But the entire system issue, which the Court of Appeals deemed "an afterthought on the part of the Commission" (R. 5499), was not mentioned in this case until after the Commission's original "injury" theory was repudiated by this Court in 1951. The bulky record at bar was built during hearings in 1941 and 1942. Although the Examiner covered every relevant facet of the case, no challenge to any pricing system was even implied in his 80-page Report, the FTC staff's exceptions thereto in 1943, or the Commission's original findings in 1945. In fact, the Examiner characterized respondent's classification of its four customers as jobbers, from which Commission counsel today purport to detect a sinister system, as "bona fide in all respects". (R. 5098-99).

Significantly, the landmark pricing system cases, *Staley* and *Cement Institute*, were in litigation before the Commission simultaneously with this case. The *Cement* complaint, filed in 1937, from the outset attacked the prevalence of an industry pricing "system", while the instant case instituted in 1939 challenged only individual prices of the respondent.[25] Months prior to the Commission's original ruling against respondent in 1945, reaffirmed in 1946, *Staley* was decided by this Court on grounds which barred a Section 2(b) defense founded upon systematic industry pricing.[26] The Commission obviously saw no system issue in this record when it then ruled against respondent's defense on other, entirely novel, grounds which need not have been invoked if an indefensible pricing system really was present.[27]

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this case here. It also raises the fundamental question of why the Commission waited so many years if all the factual proof it needed was supplied by respondent's answer back in 1941.

25. Compare 37 F.T.C. 87, 102-3, 117, 124, with R. 3, 35.

26. 324 U. S. 746 (1945).

27. Actually, in *Cement Institute* the Commission in July 1943 had already disapproved a meeting competition defense for "sys-

The system issue featured before this Court today is thus of conspicuously belated origin.[28]

Notably in this connection, the Commission's petition for certiorari pointed to the "controlling effect" of the decision below on "similar cases" involving "pricing systems" pending at that time before the same Court of Appeals (Pet. 16-17). But neither the court nor the parties in those cases so understood the ruling at bar, which was neither cited in the briefs nor mentioned in the later opinions which condemned the systematic pricing there held to exist.[29]

The Commission's request for certiorari also made much of the "direct impact" of the instant case on the still pending "similar complaints" filed in 1940 against three of

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tematic variations" in prices throughout the industry; and in September 1943 the Commission had barred the *Staley* defense designed to justify the adoption of the industry-wide basing point formula whereby the "respondents became an integral part of this pricing system." 37 F.T.C. 87, 256-57 (1943); Modified Findings as to the Facts and Conclusion, Dkt. No. 3803, par. 6(b) (Sept. 13, 1943). Again in 1944, the Commission had invalidated a meeting competition defense tendered to justify a systematic discriminatory practice. *Elizabeth Arden, Inc.*, 39 F.T.C. 288, 304 (1944). And respondent more than once brought this Court's ruling in *Staley* to the attention of the Commission at the time of its consideration of respondent's defense (R. 5209-10, 5243-44).

28. Counsel incorrectly asserts (Br., pp. 21-22) that the illegality of respondent's prices, "apart from the Section 2(b) defense, is undisputed," and that respondent no longer "challenges" the Commission's findings that its jobber classification was "arbitrary" and that its prices caused "injury to competition." See notes 46 and 92 *infra*, and accompanying text.

29. *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 156 (7th Cir. 1956); *C. E. Nichoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37, 41 (7th Cir. 1957). Not even when petitioning for certiorari to review those decisions did those respondents find any basis for citing the instant case. Nos. 900 and 1125, 1956 Term.

Moreover, the writer of the opinion in the instant case joined in the *Nichoff* ruling, dispelling the implication in the Commission's brief (p. 31 n. 14) attributing the differing results to "differently composed panels" of the court below.

respondent's competitors in Detroit.[30] Yet at the very time of the Commission's petition here, the Commission had before it motions to dismiss those cases, filed by its own staff in January 1955. And after the grant of certiorari, these companion cases, listed in the Commission Memorandum filed on October 13, 1950, at this Court's behest, were dismissed by the Commission on April 3, 1957.[31]

30. Pet. 3 n. 4, 16; Reply in Support of Pet. 11.

31. *Gulf Refining Co.*, Dkt. 4390; *Texas Co.*, Dkt. 4391; *Shell Oil Co., Inc.*, Dkt. 4392.

The self-serving Commission Press Release of June 18, 1957 quoted in its brief (p. 47 n. 27) was issued after expressions of surprise in the trade press at these dismissals in the wake of certiorari in the instant case. See, *e. g.*, *Petty's Oil Letter*, April 20, 1957.

SUMMARY OF ARGUMENT.

I.

Inasmuch as the decision below turned on the *factual* conclusion that the record at bar failed to demonstrate any pricing system, the *legal* issue as to the validity of discriminatory pricing systems posed by the Commission is purely hypothetical and gives rise to no controversy between the parties here. The unanimous decision of the Court of Appeals conformed strictly with this Court's governing precedents when it ruled, in accord with the Hearing Examiner's factual conclusions, that the statutory meeting competition proviso was satisfied by uncontroverted evidence that respondent's lower prices were granted in four individual instances over many years in order to retain established accounts in the face of competitors' lower price offerings.

II.

Should this Court, contrary to the *Universal Camera* rule and traditional practice, duplicate the evaluation of this record by the Court of Appeals, respondent's defense could only be reaffirmed.

The Detroit area of the 1930s, historically oversupplied with excess gasoline, was shaken by "price cutting orgies" and marketing chaos, and had none of the stability essential to the operation of any industry pricing system.

Respondent's lower prices to its four customers were wholly defensive responses to persistent price raids by competitors. Many rival suppliers in Detroit sought to capture respondent's valuable distributors, and had actually succeeded in taking away several of its accounts. The

wide variety of offerings made to respondent's customers by these aggressive competitors confirms that *they* did not price pursuant to any industry system. Conversely, respondent's reluctance to depart from its uniform Detroit tank wagon price, and haggling over price with its own customers prior to any reductions, shows that *respondent itself* acted not according to a system. Rather respondent reacted in individual competitive situations, and gave the minimum concessions essential to hold the account.

III.

Counsel's references to three of the numerous important suppliers in Detroit cannot establish the asserted industry pricing system, particularly since many other suppliers marketed gasoline in Detroit in diverse ways differing from respondent and each other.

Since counsel's key contention of a pricing system can find no support in the evidence, primary reliance is now placed on the belatedly detected "admission" in respondent's 1941 answer to the Commission complaint. Actually, the asserted "admission" concerns respondent's alternate defense that its lower prices were made in line with a proper functional classification of its customers. Respondent's insistence that its maximum 1½¢ reduction be given only to customers performing valuable bulk storage and delivery functions effectively demonstrates its conservative exercise of the statutory right to meet competition. This surely enhances rather than impugns respondent's good faith in meeting competitors' prices.

Moreover, there is no basis for counsel's concern that acceptance of respondent's defense would validate the price discriminations of other suppliers. The decision below rests on the presence of actual competitive offers made by competitors and met by respondent to retain its customers.

Since the record contains not a single instance where respondent itself offered a discriminatory price to the customers of its rivals, approval of respondent's defense in this case can have no bearing on possible defenses raised by competitors to justify any price discriminations on their part.

The *Geographic Pricing* decisions, cited by counsel as dispositive, are not in point. As explained by the Commission itself, those cases concern industry-wide collusive pricing systems which prevented precisely the individual customer solicitations on account of price with which the instant case entirely deals.

IV.

Notwithstanding counsel's contrary insinuations, the legality of the competitive offers met by respondent is now confirmed. This Court's remand directing attention to that issue was ignored by the Commission, despite respondent's prompt request for a finding in conformity with the mandate. Even though respondent was prepared to document the requested findings as to legality, the Commission majority not only failed to go forward with any evidence impeaching legality, but actually declined to notice the issue. The minority Commissioners, after reappraising the record, proposed a finding that the competitive offers were lawful.

What is more, after certiorari was granted in the instant case, the Commission dismissed, *sua sponte*, the companion proceedings against three of respondent's Detroit competitors that had been brought to the attention of the Court in the course of prior oral argument in connection with the legality of the prices met by respondent. Surely counsel at this stage can no longer challenge the legality of the competitive offers by these three, let alone those of its numerous other competitors, which confronted respondent in the relevant years.

V.

The decision below properly reversed those aspects of the Commission's ruling which defeated respondent's meeting competition defense by reason of asserted competitive "injury" and respondent's inability to cost-justify in full. Cost-justification is a completely independent statutory defense. And resort to competitive "injury" would, as this Court observed in 1951, make the meeting competition defense "practically meaningless", since Section 2(b) does not come into play until a prima facie case of violation, including "injury", appears.

Besides, no "injury" was causally attributable to respondent's lower prices, which only defensively responded to equally low prices tendered repeatedly to its customers by competitors. Respondent's own prices, therefore, did not initiate or change the competitive situation on the resale level. Moreover, respondent's lower prices were minimized to the extent they were offset by the customer's performance of costly distribution functions. Hence they could not have any significant effect on his independently determined resale prices.

VI.

This Court should accept the Court of Appeals' factual evaluation of the evidence which comports fully with the *Universal Camera* doctrine, and decline to sit as an initial reviewer of the record *de novo*. Although the Commission's request for review may have stated a legal issue worthy of this Court's certiorari jurisdiction, the arguments of both petitioner and respondent highlight that the controversy here is basically factual. Accordingly, the "usual rule of noninterference" with appellate decisions centering on factual evaluations should govern here. *Federal Trade Commission* v. *American Tobacco Co.*, 274 U. S. 543 (1927).

ARGUMENT.

I.

THE HOLDING BELOW CONFORMS WITH THE DECISIONS OF THIS COURT CONFINING THE MEETING COMPETITION DEFENSE TO INDIVIDUAL COMPETITIVE SITUATIONS.

A. The Court of Appeals Did Not Sanction Any Discriminatory Pricing System.

The Commission rests its case before this Court largely on the erroneous premise that the decision below construed the Act as permitting a discriminatory pricing system to be justified under the meeting competition proviso. In the view of Commission counsel, the court below construed Section 2(b) as tolerating a general price "system" or "dual price formula" so long as it was not inherently *unlawful* and did not entail the meeting of *illegal* prices by competitors as in the case of a "basing-point system." On this false assumption, the decision is denounced as providing "a positive incentive to competing suppliers to adopt parallel pricing systems so that each can defend its own system on the basis of similar systems used by others."[32]

But the court below did not and *could* not have held any pricing system justifiable under Section 2(b), for it squarely decided that respondent's prices were *not* granted systematically. The opinion stressed the fact findings of the Hearing Examiner, accepted and confirmed by the two minority Commissioners, that respondent's prices to its

32. Br., p. 50. See also Br., pp. 33-34, 46-52. That respondent's lower prices, made solely to hold its own customers, could not possibly provide any basis for the defense by competitors of *their* price discriminations is demonstrated at pp. 48-49 *infra*.

four jobbers "was granted to meet the equally low prices offered by competitors" (R. 5498). The court declared, moreover, that the "bargaining and haggling which took place" was "hardly consistent with the Commission's theory that prices were reduced pursuant to a system" (R. 5501). The facts were found "to dispel completely any idea that such reduction in price was systematic, as urged by the Commission" (R. 5501).

Respondent's meeting competition defense was held "firmly established" (R. 5502), not on the basis of a pricing system, but on the factual premise that respondent "sold invariably at its uniform tank wagon price, except when at different times it reduced its price to meet competitive offers to retain a customer" (R. 5501).

As a matter of fact, the Department of Justice initially seemed to recognize that the decision at bar did not validate discriminatory pricing systems. The Deputy Attorney General, quoting the rejection by the court below of the "Commission's theory that prices were reduced pursuant to a system," advised Congress in 1956 that the decision did not "broaden the scope or adversely affect what we consider to be the merits of a Section 2(b) defense."[33]

33. Letter dated June 27, 1956 from the Acting Deputy Attorney General to the Chairman of the Senate Judiciary Committee, reprinted in *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess. 688-89. The letter, stating that the Justice Department had "carefully analyzed" the decision below, based its conclusions as quoted above on the following understanding of the decision:

> "In the *Standard Oil of Indiana* case the seventh circuit court appeared to place great weight on the fact that Standard Oil had apparently proved in the original proceeding that its lower prices were made in good faith to meet an equally low price of a competitor because of the fact that the findings of the Federal Trade Commission initial hearing examiner to this effect were never repudiated or disproved. The Court commented: 'We think it is pertinent to observe that petitioner's good faith has either been recognized or assumed at all levels

B. The Holding Below Faithfully Applied This Court's Controlling Precedents.

Approval of a meeting competition defense in the factual circumstances on which the lower court based its decision conforms strictly with the law as enunciated by this Court.[34] With respect to the legal status of industry pricing systems, there is no real controversy between the parties here.

Since the *Staley* case in 1945, this Court has maintained that the meeting competition proviso "places emphasis on individual competitive situations, rather than upon a general system of competition." *Federal Trade Commission*

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during this proceeding.' The Court apparently was convinced that Standard Oil had proved that it was meeting a 'lawful' lower price of a competitor, stating 'in the instant situation there is no finding, no contention, and not even a suspicion but that the competing prices which petitioner met were lawful.' Finally, *the Court held that these price reductions, used as a defensive mechanism to retain the four existing customers, were based upon individual competitive situations rather than pursuant to a 'pricing system'* stating '[t]he bargaining and haggling which took place between petitioner and the four involved 'wholesalers' prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system.' "

For the Court's convenience, the letter is reprinted in full text in Appendix B, pp. 77-79 *infra*.

Rep. Patman, co-sponsor of the Robinson-Patman Act, also understood the decision below in like manner. As he viewed the decision, "the nub of the thinking, as it seems to me, is that Standard was doing no more than the Supreme Court said it could do under the law." Cong. Rec., June 11, 1956, p. 9016.

34. This was the view also expressed recently by another Court of Appeals concerning the instant proceedings: "In reversing the judgment in favor of the Federal Trade Commission, the [Supreme] Court assumed that the Standard Oil Company had brought itself within the § 2(b) proviso. • • • The Supreme Court returned the case to the Federal Trade Commission to make its findings as to whether the Standard Oil Company had proven itself to come within § 2(b). The Commission reviewed the matter and failed to give full effect to the Supreme Court's opinion as to the availability of § 2(b) relief." *Standard Oil Co.* v. *Brown*, 238 F. 2d 54, 57-58 (5th Cir. 1956).

v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 753, 754 (1945).[35] On the other hand, a seller need only "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Id.* at 760. For, in recognition of the realities of business, "the statute does not place an impossible burden on sellers." *Id.* at 759.

Moreover, this Court's opinion on its prior review of the instant case made clear that "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor," and emphasized the "plain language and established practice which permits a seller, through Section 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers" (R. 5319).

In the case at bar, the Court of Appeals agreed that "respondent was confronted with the problem of reducing its price to meet competitive offerings or of forfeiting the business of the four jobbers" (R. 5498), and read the record to confirm that respondent "sold invariably at its uniform tank wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer" (R. 5501).[36]

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35. See also *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 43 (1948); *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 725 (1948). Most recently, the Court in an industry-wide zone pricing case reaffirmed that this proviso could not justify "an entire pricing system," but rather was "designed to protect competitors in individual transactions." *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 431 (1957).

36. The Commission's brief throughout controverts the facts recited in the court's opinion—not by challenging the correctness of the court's evaluation of the record evidence under the *Universal*

These price reductions made by respondent on widely separate occasions over a period of years to retain the business of four of its several hundred Detroit customers are surely "individual competitive transactions" and "situations" within the meaning of this Court's guides. The Court of Appeals' validation of respondent's meeting competition defense *on the basis of these facts* thus adhered squarely to the legal principles established by this Court.[37]

Camera tests, but by disputing the court with the very Commission majority findings which were set aside as unsupported. In this way, counsel beyond the precise point at issue, *i.e.* whether the decision below properly evaluated the record in reversing the action of the Commission majority. See pp. 64-66 *infra*.

37. Although the Commission in 1950 urged here "that the words 'good faith' really add nothing to Section 2(b)" (No. 107, 1949 Term, Com. Br., p. 42), the Commission today obscures the issue by suggesting that a seller who has in fact lowered his price solely to meet competitors' equally low and lawful prices may nonetheless lose his defense for lack of "good faith" (Br., pp. 29, 46, 52-57). The term "good faith," as the Commission correctly recognized in 1950, adds no special technical requirements to the law.

Actually, the "good faith" terminology softens the stringent requirements of the Section 2(b) defense. According to *Staley*, "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. * * * [T]he statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 759-60 (1945). The decisions construing analogous state enactments are in accord. *E.g.*, *Minnesota* v. *Wolkoff*, 1957 CCH Trade Cases, par. 68,826 (Minn. 1957) and cases cited.

In sum, the "good faith" factor serves to test merely whether the seller's lower prices constitute "bona fide attempts to meet competition" (*Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 71 (1953)), or a "good faith effort to meet a competitor's equally low price" (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 43 (1948)), rather than a collusive or predatory tactic. Cf. *Staley* at 758 ("price discriminations were not made to meet a 'lower price' and consequently were not in good faith"); *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 155 F. 2d 1016 (2d Cir. 1946) ("the offer shall be made without actual intent to undercut his competitors' price").

II.

DE NOVO APPRAISAL OF THE RECORD NEGATIVES ANY SYSTEMATIC PRICING.

If this Court, contrary to precedent and practice,[38] declined to accept the factual determination below that respondent's prices were not systematic, its own *de novo* evaluation of the whole "record including the examiner's report" would confirm that the pricing system theory is devoid of evidentiary support. Cf. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 493-497 (1951).

A. The Competitive Turmoil in Detroit Tolerated No Pricing System.

The Detroit gasoline market in the recession years of the late 1930s bore no resemblance to the stable and orderly marketing conditions essential to systematic pricing within an industry. The Examiner found that "Detroit is a highly competitive market as far as the oil industry is concerned," and characterized competition there as "intense" (R. 5113).[39]

Detroit was the hub in one of the country's most competitive areas for the distribution of gasoline. By 1940 Michigan refineries alone had grown to twenty-nine from seventeen in 1935,[40] and Michigan's own crude production met 30% of its needs (R. 1380, 1901). Besides this growth in local capacity, Detroit as a gasoline market was accessible from all distant refining centers by lake tanker, pipe-

38. *E.g., Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491 (1951); *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502-3 (1951), discussed in detail at pp. 64-68 *infra*.

39. For a comprehensive study of the Detroit gasoline marketing situation in the relevant years, see McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. of Chi. L. Rev. 398 (1956).

40. (Resp. Ex. 25-B, R. 4828, 1378).

line and rail (Resp. Ex. 24, R. 4826, 1378, 1900). All told, over twenty large oil companies competed for the Detroit market during these years, in addition to numerous small refiners, distributors and even "yard haulers" (R. 1900-3, 1969, 4885-86, 5106-7, 5404).

Competition was intensified in the price-conscious recession years relevant to this case (R. 5113, 414, 443, 540, 1904-5). The Detroit area had historically been oversupplied with excess gasoline from the Mid-Continent and other substantial refining centers (R. 1900-1). And while available supplies from Michigan fields and other refining centers mounted, gasoline consumption between 1937 and 1938 alone slumped by over 10% in Detroit where layoffs in the automobile industry curtailed consumer spending (R. 1904). The effect of this gasoline glut was a flare-up of price wars, customers raids and a "scramble for gallonage" at all marketing levels (R. 1904, 1683-84, 1908, 1975).[41]

As the Examiner reported, "In 1938 the gasoline war had reached its peak, a general business depression existed, causing a demoralized retail situation" shaken by periodic "price cutting orgies" (R. 5116, 5118).

Amid these upheavals in the chaotic Detroit gasoline market, no placid industry pricing system could or did prevail in the sale of gasoline. On the contrary, aggressive ingenuity rather than collusive conformity was at a premium in the competitive "scramble".

41. Price concessions were not the only weapon in the Detroit price wars. Other competitive inducements included premiums such as trading stamps, free cigarettes, china, clocks, eggs and lottery tickets (R. 1909).

B. The Wide Range of Aggressive Competitive Offers Contradicts Any Systematic Industry Pricing.

Respondent was on the defensive throughout. It merely sought to hold some of its established accounts, and is not charged with soliciting competitors' customers.

Respondent's gasoline sales suffered steady inroads during these years. In 1937, respondent sold 70 million gallons of gasoline in the Detroit area, accounting for 17.1% of the total (R. 5061, 4879). In the next year, respondent's sales dropped off almost 10 million gallons, while its share of the Detroit market shrank to 16.4% (R. 5061, 4879). Respondent's market position continued to decline after a recovery in 1939, so that by 1940—the last year covered by this record—its share had fallen to 16.2% of the Detroit market (R. 5061, 4879). By contrast, sales of private brand gasoline by jobbers in the Detroit area shot up 61% between 1937 and 1938 alone, and more than doubled over the period 1936-1940 (R. 4881, 1970-75).

Typical of the aggressive Detroit competition throughout the 1930s and refuting any pricing system were the successful price raids on respondent's valuable customers. The large number of respondent's customers owning their retail or bulk storage facilities were supplied on a short-term contractual or even informal day-to-day basis, and were free to negotiate with rival suppliers or switch to anyone offering more favorable prices or terms (R. 5104, 5058).[42]

Apart from the four customers which respondent re-

42. Respondent's Detroit tank car customers which maintained their own bulk plants were supplied on a day-by-day basis without any term contract or agreement (R. 5058, 5104, 115-16). Of the approximately 358 retail service stations supplied by respondent in Detroit, about 208 were company-owned and leased to operators ordinarily for a one-year term, and the remaining 150 stations, independently owned and operated, purchased on a one-year contractual basis (R. 5057-5058).

tained by meeting competitors' prices, a number of accounts were lost because of competitive offerings which respondent failed to meet. Carnick and Dick Lock, two of respondent's jobber customers already receiving the lower tank car price, accepted better offers of another supplier which in one case permitted free storage at its bulk plant for the customer's benefit (R. 1912, 1915-16). A third customer, Middleton, also buying at respondent's lower tank car price, shifted to a competitor for "a better proposition" (R. 1913-15).

As the Examiner reported, "the 'jobber' customer market is subject to intense competition and frequent attempts by Standard Oil Company's competitors to proselyte accounts by offering more advantageous terms and service" (R. 5103-4).

In addition to losing these tank car accounts to more attractive competitive offers, respondent also lost several tank wagon customers. One dealer went over to Phillips 66 gasoline distributed by Red Indian Oil Company when offered a "concession" (R. 489-90). Another dealer went over to Argo Oil Company, a distributor of Ohio Oil Company's Linco and Marathon gasoline (R. 179-80, 567, 560-61), and a Montgomery-Ward service station did likewise after respondent failed to meet competitive offers which would have entailed giving its lower tank car price for tank wagon deliveries (R. 2079). Ned's, respondent's biggest Detroit dealer, was already purchasing motor oil from Red Indian when he seriously considered accepting Red Indian's offers of Phillips 66 and Standard of Ohio Fleet Wing gasoline (R. 1804, 3108-9).[43]

It was in this context of persistent price raids and actual lost accounts that respondent tried to hold its remaining

[43] The record does not purport to cover all losses of customers for the Examiner excluded proof concerning the loss to other brands offered at lower tank wagon prices, including Gulf, Dixie Hi-Speed, and Fleet Wing, of numerous dealers supplied by respondent's jobber customers (R. 1686-95).

valuable Detroit customers. Out of a total annual volume of 60 to 75 million gallons annually sold by respondent in the Detroit area, 8 to 15 million gallons were taken by the four customers: Ned's, Citrin, Wayne, and Stikeman. (R. 5061, 4879). Loss of these four could have sacrificed almost 20% of respondent's annual Detroit sales (R. 5061, 4879).

The variety of the competitive offers tendered to respondent's four tank car customers likewise dispels any trace of systematic industry pricing in Detroit.

Take, for example, the offers received by respondent's customer Citrin-Kolb (R. 5102, 5410, 12, 1253-1310, 2002-10): Hicock Oil Company, a Pure Oil distributor, offered a proposition permitting Citrin to buy Hi-Speed gasoline at a 1¢ per gallon more favorable basis than his arrangement with respondent, and a share in a new jointly owned corporation with Hicock (R. 5102, 2002-5, 1259-69). Shell tendered to Citrin and Middleton Oil Company the exclusive Wayne County distributorship for Shell's Silver Flash gasoline at ½ to ¾¢ per gallon below respondent's price, coupled with free advertising and equipment (R. 5102, 2006, 1269-74.)[44] Gulf underbid respondent's price by tendering the free use of Gulf's bulk storage plant as well as "pumps and other station equipment, including repairs to pumps, painting the dealer stations, and equipment used in connection therewith" (R. 5102-3, 5411, 2006, 1277-80). The Texas Company offered ½¢ a gallon below respondent's tank car price, together with free "advertising, paint and globes" and a guaranteed 5 year contract (R. 5103, 5411, 2008, 1282-90). Argo Oil Company, a distributor of Ohio Oil Company Marathon gasoline, offered Citrin 2¢ or more below respondent's tank wagon price (R. 2010, 5411, 1295-1301). Finally, Aurora, a local Michigan refinery with a heavy Detroit volume, tendered to Citrin gasoline with a guaranteed oc-

[44] Middleton accepted this offer and thereafter ceased to be respondent's customer (R. 1272).

tane rating higher than respondent's gasoline at ½¢ per gallon less (R. 5103, 5412, 2010, 2013, 1301-10), and repeatedly made the same offer over a period of years to another customer of respondent. (R. 5101, 1147-52, 1165).

Equally varied were the bids to respondent's other tank car customers.[45] Red Indian Oil Company, distributor of Phillips 66, repeatedly offered gasoline at 1½¢ below respondent's tank wagon price, with free storage at Red Indian's bulk plant (R. 1804-5, 1988, 5406). One customer temporarily accepted a better offer by White Star Refining Company (R. 2013-14). Phillips Petroleum also bid for this customer with a price lower than respondent's (R. 2013-14). And National Refining Company, a substantial gasoline supplier in the United States and Canada already selling to jobbers just outside Detroit, over a period of months negotiated for the exclusive Detroit area distribution of its White Rose brand by two of respondent's customers jointly at ½¢ per gallon below respondent's tank car price (R. 5101-2, 5415, 1152-55, 1211, 1949-50, 2013-14).

This miscellany of competitive offerings tendered by respondent's rivals disproves any industry pricing system. For the wide range and diversity of their bids reflected no common industry-wide pricing formula, but rather showed individual efforts to capture respondent's valuable customers with a variety of inducements. It was at respondent's own insistence before granting its lower tank car price, and not because of any industry system; that respondent's customers possessed bulk storage and transportation facilities enabling them to take tank car delivery of gasoline so as to qualify as jobbers.[46]

45. See also additional offers made to Ned's, discussed at pp. 35-39 *infra*. Besides the detailed competitive offers to these customers, respondent's District Manager told of "being informed by them from time to time of other offers and inducements" (R. 2014).

46. Counsel's assertion that respondent was "arbitrary" in classifying as jobbers customers performing the jobber function,

C. The "Tug of War" Preceding the Successive Lower Prices to Ned's, Respondent's "Most Valuable" Customer, Belies Any Systematic Pricing by Respondent.

The record's most prominent instance of lower prices illustrates the competitive rather than systematic nature of respondent's own pricing in Detroit. Ned's, "respondent's most valuable tank-wagon customer" whose aggressive resale pricing tactics were the Commission's prime target (R. 5093, 5111, 955), received respondent's lower price not pursuant to any formula or system, but only after a "constant tug of war" over several years.[47]

The Hearing Examiner's Report graphically portrays the individualistic character of respondent's pricing relationship with Ned's, which in 1936 received a ½¢ reduction and in 1938 the 1½¢ per gallon lower tank car price:

Ned's Auto Supply Company since its establishment in 1918 had bought gasoline from respondent on a tank wagon basis at the price quoted to other Detroit dealers. However,

> "from 1930 to 1936 Ned's had received offers from responsible companies handling branded gasolines comparable in quality to those furnished by respondent at substantially lower prices—one cent per gallon less by tank-wagon, and from two to five cents per gallon less by tank-car than the price respondent was charging

because they also sold at retail (Br., pp. 44-45), was not only discounted by this Court in 1951 (R. 5309 n. 4), but appears repudiated by the Commission itself. After discussing the instant proceedings, the opinion of the Commission in *Doubleday & Co., Inc.*, Dkt. 5897, declared: "In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices." CCH Trade Reg. Rep. Transfer Binder, par. 25,634 (1955).

For detailed refutation of counsel's system argument, see pp. 39-47 *infra*.

47. Ned's president testified to the "constant tug of war between Standard Oil and us" (R. 1809).

Ned's. Some of these offers were communicated to respondent's District Manager with the request that Ned's be accorded a lower price but respondent's District Manager refused to allow an increased margin" (R. 5093-4).[48]

According to the Examiner,

> "as a final effort to obtain a lower price from respondent, Ned's Company by letter dated August 27, 1936 advised respondent's District Manager that it had received an offer from a competitive major oil company to supply it gasoline at a lower price than it was then receiving from respondent and it was then its intention to accept the offer. This was followed by a conference between Charles H. Gershenson, President of Ned's and P. A. Raupagh, respondent's District Manager, at which Gershenson informed Raupagh that the letter dated August 27 was an ultimatum and that Ned's Company had definitely decided to accept the lower offer from the competing company unless it 'got a better deal from the Standard Oil Company'." (R. 5094).

In the course of an interview requested by Ned's with an official at respondent's headquarters in Chicago "before the final break occurred," Gershenson insisted "that if respondent did not grant Ned's a better price, either a better tank-wagon price or a tank-car price, that Ned's was going to stop doing business with Standard" (R. 5094-95). And

48. The efforts to dissuade Ned's were thus reported:

> "Respondent's District Manager would stress the long private and public association of Ned's with respondent and its branded gasolines which had acquired wide public acceptance, and the volume of business developed; that a change to another competitive brand would result in loss of customers and decrease in volume, which would off-set in profits the difference in the cost of the gasoline. Charles H. Gershenson, President of Ned's Company, testified that he appreciated the force of the argument advanced by respondent's District Manager and that in addition thereto his company did not want to change its supplier of gasoline for sentimental reasons—his father had passed away, and the family entertained 'a superstition that the last thing we wanted to do was change from the Standard Oil Company'" (R. 5094).

only after respondent's District Manager "came to the definite conclusion that respondent would lose Ned's business unless respondent met, at least part way, the offers of competitors" was Ned's accorded a ½¢ per gallon reduction on September 1, 1936 (R. 5095).

In the Examiner's conclusion of fact, "the differential of .5¢ per gallon on Red Crown gasoline respondent granted Ned's Auto Supply Company on tank wagon deliveries from September 1, 1936, to March 1, 1938, was made to meet an equally low or lower price of a competitor or competitors for branded gasolines of comparable grade and quality and to retain Ned's Company's business" (R. 5096).[49]

Respondent was able to hold Ned's business with this ½¢ for a time. But, as the Examiner reported, Ned's "was not satisfied," and in a letter in February 1938 demanded "immediate consideration to the desirability of continuing as our gasoline supplier, but at tank car prices. Otherwise, we shall be compelled to re-open negotiations with other suppliers" (R. 5100).[50] At a final conference, "Gershenson stated that his letter dated February 14, 1938 was an ultimatum" and that unless respondent "met, at least part-way, the competitive offers of the Shell, Red Indian and Texas Companies, which offers were of dif-

49. If respondent had quoted its prices pursuant to a system, as the Commission's brief contends, surely Ned's, respondent's "most valuable" customer, should have been the first to get the full system price without having to haggle for months and then reluctantly settling for a mere ½¢ reduction as "better than nothing" (R. 1813-15, 1991-94).

50. "Gershenson informed Raupagh that the available offer from the Red Indian Company quoted a price ⅜ of a cent lower on tank-car deliveries than respondent's price, and had an additional advantage in that it would be unnecessary for Ned's to have and maintain its own bulk plant; that the price quoted by the Shell Oil Company was .5¢ lower than respondent's tank-car price; and that the offer from the Texas Company for 2.5¢ lower on the house brand and 3.25¢ lower on Ethyl gasoline" (R. 5100).

ferentials as much as 2¢ per gallon, Ned's would quit purchasing from respondent and accept a competitive offer" (R. 5100-01).[51]

Determined to get a tank car price, Ned's shortly thereafter acquired a bulk plant and made arrangements for hauling, "with the expectation of buying gasoline in tank cars from either Standard or somebody else" (R. 226-7, 1823, 1868, 5100). Only then, as the Examiner found, respondent on March 7, 1938 finally "acceded to Ned's demands" and granted Ned's its lower tank car price (R. 5101). The testimony of respondent's Detroit District Manager, adopted by the Examiner, was that he "was convinced that if respondent did not meet, or approximate, such competitive offers, Ned's would be lost as a customer; that knowing the market, as he did, he was of the definite opinion that the threats made by [Ned's] were made in earnest and would be acted upon unless respondent placed Ned's on a competitive basis" (R. 5101).[52]

Accordingly, the Examiner also reported that "The recognition by respondent of Ned's Auto Supply Company

51. In addition to these specific propositions from Shell, Red Indian, and Texas Company, Standard's District Manager was also told of offers to Ned's by Sun Oil and Gulf, as well as "many more offers" (R. 1998, 2000, 2001). In this connection, he mentioned that his relations with Ned's "haven't been as nice as they should be, when these competitive offers would come up," and that "sometimes the air was kind of hot." (R. 2002).

52. Several of the offers to Ned's were reaffirmed as late as 1940 (R. 1835-37, 3107). The record fully supports the Examiner as to the offers to Ned's (R. 1800-37, 1990-2002, 3107, 5406-10). Despite the fact that Ned's satisfied Standard's minimum criteria for jobber recognition prior to 1936 (R. 4873-74), its tank car price was withheld until the 1938 "ultimatum."

Contrast these record facts as reported by the Examiner with the Commission's assertion (Br., p. 10 n. 6, 43) that respondent in granting the lower prices to Ned's was not responding to competitive offers, "but instead granted the lower price on the understanding that Ned's would conform to Standard's requirements for 'jobber' status (R. 1821, 1995), the volume requirement having already been satisfied (R. 119, 5372)."

as a jobber or wholesaler was a forced recognition to retain that company's business" (R. 5098).

Such a "tug of war" for a price advantage is surely alien to any "dual pricing formula" or "system." It demonstrates price reductions granted reluctantly and in the minimum amounts essential to retain a valuable customer in "individual competitive transactions"—rather than systematically pursuant to any preconceived general plan or system.

III.

THE COMMISSION'S EFFORTS TO CONSTRUCT A PRICING "POLICY, METHOD, OR SYSTEM" ARE UNSUPPORTABLE.

Permeating counsel's brief is the charge that respondent's prices admittedly reflect an industry-wide, perhaps collusive, scheme.[53] Relying mainly on the asserted "admissions" in respondent's answer to the complaint in 1941, the Commission claims that respondent's designation of its tank car customers as "jobbers" corresponded with the practice of other gasoline suppliers—thereby establishing an inherently discriminatory "industry-wide dual price system" (pp. 26, 30, 36, 38-39, 50-52). In light of this assumption, the decision at bar purportedly carries the grave consequence that "as long as competing sellers follow the same discriminatory pricing policies, each is protected," which would "provide a positive incentive to competing suppliers

53. The brief's allusions to the dangers of a supplier's "attempt to manipulate its overall price scale upward" where "competitors employ the same dual price formula" (p. 30) are not only destitute of a trace of support from the record, but are belied by the Examiner's findings that competition was "intense" in Detroit, which was "a highly competitive market as far as the oil industry is concerned" (R. 5113)—a condition confirmed by scholarly studies of the Detroit market during those years. See McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. of Chi. L. Rev. 398 (1956); and Note, 67 Harv. L. Rev. 294 (1953).

to adopt parallel pricing systems so that each can defend its own system on the basis of similar systems used by others" (pp. 50, 51). Counsel thus conjure up an industry-wide concert whereby sellers practice parallel price discriminations in reciprocal reliance upon the meeting of each other's competition.

Counsel's contentions cannot overcome the record and the facts.

A. The Record Contradicts Each Premise of the Pricing System Assertion.

The Commission's brief (pp. 10 n. 6, 25-26, 44 n. 24) interprets the findings of the majority Commissioners as supporting the pricing system contention on three premises: (1) that respondent's lower prices were initially granted prior to the Robinson-Patman Act, or prior to the customer's receipt of competitive offers and "never responded to" such offers;[54] (2) that respondent met the prices of gasolines of lesser public acceptance which could not pose a "serious competitive threat"; and (3) that respondent's lower prices merely reflected an industry-wide discriminatory "dual price system".

The record refutes each of these premises:

(1) While now decrying the scarcity of competitive offers prior to the 1936 Robinson-Patman amendments, counsel ignore that evidence of pre-1936 competitive offers was ruled out as immaterial, thus preventing respondent

54. The brief also maintains that some of the competitive offers to respondent's customers occurred after the date the instant complaint was filed (P. 10 n. 6). But, as bearing on respondent's need to continue granting its lower prices, the relevancy of the recurrent offers to its customers, before as well as after the complaint was acknowledged by the Commission in 1942 when it restored precisely this evidence which the Examiner had stricken (R. 93-94, 1240-42). Besides, the very customers allegedly receiving offers *after* the complaint was filed had in fact been negotiating with the competitor for several months previously (R. 1211-12, 1166-67).

from making a fuller record for these early years (R. 1146, 1242, 1327). Even then, the evidence shows numerous pre-1936 negotiations and offers. Citvin negotiated with Paragon in 1928, and in 1939 had offers from Hicock Oil Company for Pure Oil Hi-Speed gasoline and from Shell for Silverflash (R. 1253-55, 1259-74). Ned's negotiated with Argo Oil Company and Red Indian Oil Company in 1930 for Phillips 66 and Ohio Oil Company Dixie gasoline (R. 1803-6). Wayne actually purchased Pure Oil Hi-Speed gasoline from Highland in 1935 (R. 984-85). Stikeman had purchased White Star in 1932, and actively negotiated with Phillips before 1936 (R. 2013-14).

Counsel's contention that respondent failed to "respond to" competitive offers misunderstands the purport of the evidence and the issue in this case. Counsel apparently assume that a seller "responds" to competitive offerings only if each particular offer is immediately followed by his price reduction. But the recurrent competitive offers to respondent's customers on this record demonstrate that respondent was forced *to continue* granting its lower tank car price or lose an account.[55] Respondent's evidence of pre-1936 offers was repeatedly ruled out as immaterial precisely because the basic issue was viewed throughout as whether the *continuation* of respondent's lower prices after the passage of the Robinson-Patman Act was essential to meet competitors' equally low prices.[56]

55. The Commission itself has recently disclaimed that prices made to meet competitor's equally low price must be "temporary." *E. E. Nuhoff & Co.*, Dkt. 5765, [CCH Trade Reg. Rep. Transfer Binder, par. 25,467 (1955).

56. See especially the Examiner's ruling which required proof that as of the date of the Act "it was necessary for this respondent to continue to maintain those prices in order to meet competition." (R. 1241). Moreover, this was the predicate of the Examiner's Report which concluded that respondent's lower prices subsequent to the date of the Robinson-Patman Act were granted to meet competitive offers in order to retain its customers (R. 5104, 5122). The rationale of the minority Commissioners is to like effect (R. 5416-20).

(2) Counsel's disparagement of offers said to involve gasoline of lesser public acceptance is equally misconceived. Section 2(b) does not require that a seller meet lower price offers for gasoline of equal public acceptance. When the customer is earnestly considering a competitive bid for his business, a seller is surely entitled to retain that account by lowering its own price in good faith to meet the offer—regardless of abstract considerations of public acceptance.[57] The real test is whether his own price reduction is truly necessitated by competitive offers threatening to capture his customers.

The fact is that the gasolines of lesser "public acceptance" distributed by Red Indian Oil Company and Argo Oil Company, now belittled by the Commission, were branded products of such important refiners as Phillips (Phillips 66), Standard Oil of Ohio (Fleet Wing) and Ohio Oil Company (Marathon, Linco, Dixie) (R. 1349, 2080). Contrary to the Commission majority, which confused such offers with "off-brand gasolines" (R. 5387), the Examiner considered them "in immediate and direct competition" with respondent's and other major branded gasolines, and "of substantially the same quality in the public mind" (R. 5107).[58]

57. If the competitive offer involves gasoline which finds less favor with the public and hence can command only a lower price in the market, a seller may perhaps not reduce his own price far enough to meet exactly the price offer for the less popular product, since this may be tantamount to undercutting it in a marketing sense. *Cf. Samuel H. Moss, Inc. v. Federal Trade Commission*, 155 F. 2d 1016 (2d Cir. 1946). This does not mean, however, that the seller may never lower his price part-way in order to hold his customers when they are solicited with such products at prices so low as to warrant their serious consideration.

58. Actually, the Standard of Ohio Fleet Wing gasoline distributed by Red Indian, which the Commission majority singled out for special scorn (R. 5387), was posted at the same tank wagon price as respondent's gasoline (R. 2118), and was marketed through at least 100 outlets in Detroit (R. 1866-67).

The Commission's confusion may have stemmed from testimony concerning the cut-rate competition offered in Detroit by oil companies such as Charles E. Austin, Inc., Puritan, Sunny Service

They had forcefully demonstrated their competitive "threat" by taking several customers away from respondent (R. 489-90, 560-61, 2079).

Moreover, unless the suppliers and respondent's customers negotiating with respect to these gasolines seriously weighed their appeal as a competitive "threat" to respondent's product, why did they spend the time to negotiate?[59]

(3) The evidence does not disclose the "industry-wide dual price system", asserted throughout by Commission counsel (Br., pp. 26, 30-34, 36-39, 42-55).[60]

The claim of an "industry-wide dual price system" rests on the pricing of a small minority of the more than twenty substantial gasoline suppliers in the Detroit area—Shell, Gulf, and Texas, against whom the Commission filed its abortive complaints (Br., pp. 40 n. 22, 47, 51). But besides these three, there were many important suppliers in Detroit which counsel ignore entirely—such as Socony-Vacuum, Sun, Sinclair, Pure Oil, Phillips, Cities Service, Standard of Ohio, Ohio Oil Company, and Mid-Continent Petroleum. (Resp. Ex. 55-A & B, R. 4875-76, 4923). Of these, several marketed in Detroit through large distributors or jobbers

Leonard and Roosevelt, which marketed off-brand gasoline such as Zip and Joy at prices up to 6¢ per gallon below the nationally known brands (R. 5107, 1686, 1398, 882, 1843-46, 1960-68).

59. The Commission's efforts to minimize these offers is undercut by the concession that respondent's initial 1¢ reduction to Nod's is no longer challenged (Br., p. 43). For that lower price to Nod's met, among others, the very Red Indian gasoline offer for Fleet Wing which the findings undertake to disparage (R. 5387). Also, the Examiner excluded testimony that retailers of respondent's gasoline were actively solicited by distributors of Standard of Ohio Fleet Wing, Ohio Oil Company Dixie, as well as Pure Oil Company and Cities Service gasoline (R. 898-903, 1688-95).

60. The system contention is not even reached unless the offers concerning gasolines of alleged lesser public acceptance are first properly ruled out. For the claim of a system is based on the assumption that the only offers at issue are those involving gasolines of admittedly equal public acceptance. Unless the other offers are disposed of, the system assertion is manifestly untenable.

purchasing on a tank car basis only (Cities Service, Stan ard of Ohio, Ohio Oil Company, Phillips) (*Ibid.*, Resp. E 38-C, R. 4866, 3092-98, 1259, 1955, 1982, 1805, 2013).[61] N tional Refining Company sought to invade the Detroit ma ket on the basis of exclusive jobber sales (R. 1949, 2012 And respondent's three largest Detroit rivals sold only a single uniform tank-wagon price, either to dealers d rectly (Sun, Socony-Vacuum) or through commissi agents (Sinclair) (R. 5301, 2129-30, 2075, 977, 945, 32 Resp. Ex. 55-B, R. 4876, 1923).

Under these circumstances, counsel's references to thr suppliers, not even ranking within the five largest in Detr (R. 2129-30), hardly suffice to construct an industry-wi dual price system[62]—particularly in view of the Commi sion's own dismissal of these three cases.

B. The Claimed "Admission" in Respondent's Assertio in 1940 of an Alternate Defense of Functional Custom Classification Is Baseless.

The evidence does not support any "industry-wide du price system," and Commission counsel's brief does n make any serious contrary showing. Instead, the syst claim today rests mainly on an asserted "admission" in r spondent's answer filed in 1941 (Br., pp. 36-42).

This so-called admission had not been heretofore d tected during many months of hearings and fifteen yea of litigation. No claim of any admission is contained

61. The pattern of distribution employed by the respective su pliers in other communities varied. (Resp. Ex. 23, R. 93, 51, 332- 942-43, 971, 978, 1074-75, 1623, 2535). Phillips, for example, m keted through both jobbers and retailers in Milwaukee and Louis (Resp. Ex. 23, R. 93, 51, 1072).

62. The record's failure to indicate clearly how the other pr cipal suppliers marketed in the Detroit area is doubtless due to fact that the "system" issue was never raised while the record being built.

the Commission's original 1945 or post-remand 1953 report. Although counsel assert that the "Commission's basic findings do little more than reparase these admissions" on which they "rest almost exclusively" (Br. pp. 38, 39), these findings profess to rest on the evidence of record and nowhere refer to admissions (R. 5382-90). Nor did the staff brief filed in support of the Commission's proposed findings in 1952 perceive any admissions on respondent's part.

The fact is, as the Examiner recognized, that respondent's answer asserted several alternate and entirely consistent defenses to justify its price differentials to the four Detroit customers. In addition to the meeting competition defense based entirely on lower prices made individually to retain its four accounts in separate instances,[63] respon-

63. The Commission's brief quotes heavily from the averments in respondent's answer relating to its functional classification defense, reprinted in a special Appendix (Br. pp. 60-63), but ignores respondent's specific averments relating to its meeting competition defense. For the Court's convenience, these are reprinted as Appendix A, pp. 71-76 *infra*. In most directly pertinent part, they state that:

> "Respondent alleges that said four dealers named in Paragraph Three Complaint, or their predecessors, have been continuously, for many years last past, the gasoline customers of Respondent; that at the time each of said customers went onto a tank car basis of purchasing gasoline that it could purchase on such basis, comparable gasoline to that sold by Respondent, from a number of Respondent's competitive gasoline suppliers for an equally low or lower price than from Respondent, and upon equally or more advantageous terms and arrangements in the matter of facilities, services, inducements and benefits than it could or did receive from Respondent, and each of said customers knew of such existing and current opportunities and offers from competitors of Respondent and had from such competitors specific offers equally as low or lower in price, and equally or more favorable in terms and the furnishing of services and facilities than it had from Respondent; that Respondent knew of the existence of such competitive offers to said customers from various sources and was advised of them by said customers and advised that Respondent must meet or approach meeting such offers to retain said customers; that had

dent's refusal, at the risk of losing a customer, to grant its tank car price unless the customer assumed the entire jobber function supported the separate statutory defense of cost justification.[64] The same circumstances indicated the preservation of the additional defense of functional customer classification, in the event that this justification, implicit in the original Clayton Act, had survived the Robinson-Patman amendments.[65] These averments supplied the basis for separate motions to dismiss (R. 845-46), and were throughout treated by the Examiner as "Alternative Affirmative Defenses". They were concisely summarized as such in his Report (R. 5050).

Far from vitiating its meeting competition defense, these alternate averments of legal justification confirm respondent's conservative exercise of its right to meet a competitor's lower price offer in good faith. It met competition only in circumstances where it also had the foundation for

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not Respondent at such time given to each of said customers the tank car basis and price for purchasing gasoline, each of said customers would have been lost by Respondent to a competitive supplier" (R. 19).

64. Evidence by respondent's distributors confirmed that the 1½¢ per gallon differential approximately corresponded to their costs of performing the jobber function (R. 1771, 5154). Additional aspects of the jobber function included the responsibility on the part of a tank car customer for aiding his retail outlets with advertising, service station equipment such as pumps, tanks and insignia, as well as repairs and maintenance including the painting of buildings and paving of driveways (R. 1772, 1895-97).

65. This customer classification, providing for lower prices to jobbers, rewarded them for assuming costly marketing functions irrespective of whether they resold at wholesale or retail which otherwise would have to be performed by the supplier (R. 951, 1013-16, 1031).

E. g., *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 10 (7th Cir. 1949); Legis., 50 Harv. L. Rev. 106, 112-13 (1936); Van Cise, *How to Quote Functional Prices*, in CCH Antitrust Law Symposium, pp. 80, 84 (1957); Note, *Robinson-Patman Curtailments On Distribution Innovation: A Status Sought for Functional Discounts*, 66 Yale L. J. 243, 249 (1956), discussing the recent Commission precedents.

a claim of cost justification and, in addition, could assert the defense of functional customer classification if legally available. In this connection, the Examiner expressly commended respondent's jobber classification as "bona fide in all respects" (R. 5098-99). Surely no confession of a sinister system inheres in respondent's individual preference for losing customers rather than granting a tank car price to accounts not performing the additional bulk storage and delivery function.

In effect, Commission counsel urge the paradox that *a conservative exercise of the statutory right to meet competition forfeits that defense.* If respondent had met competitive offers indiscriminately—by granting tank car prices to customers buying merely in tank wagon lots, for example—counsel's objections would not apply. Under counsel's theory, therefore, a less moderate exercise of the meeting competition defense, entailing price concession unrelated to cost savings and functional customer distinctions, would be more likely to satisfy the law.

This Court's prior opinion in this case recognized that a seller in meeting competition may have to cope with functional pricing. The Court described the "distinctive characteristics" of jobbers, and noted the "established industry practice of recognizing such dealers as a distinctive group for operational convenience" (R. 5309). It quoted in detail from the Examiner's findings of respondent's "forced recognition" of Ned's as a jobber (R. 5311), interpolated that this "carried with it the tank-car price for gasoline" (R. 5311), and referred precisely to these findings as sufficient to sustain respondent's defense (R. 5315). Indeed, the opinion referred to the term "jobber" as merely one of "convenience and identification, because the result here is the same whether these four dealers are wholesalers or retailers" (R. 5309).

C. Respondent's Lower Prices, Granted in Sporadic Instances to Hold Its Own Customers, Could Hardly Be Relied on by Competitors to Defend Their Price Discriminations.

Counsel's assumption (Br., pp. 51-52) that approval of respondent's defense would "protect" the "same discriminatory price policies" when followed by competing sellers ignores the basis of the holding at bar.

Counsel argue that "under the decision below, the Commission's complaint against Standard must fall because of the availability of an 'equally low price' from Gulf, Texas, or Shell. Similarly, Gulf, Texas, and Shell can presumably defend the validity of their dual price formula because of the availability of Standard's 'equally low price' (the tank-car price involved in this proceeding)" (Br., p. 51).

But there is no occasion for counsel's professed concern that validation of respondent's defense would legitimize the discriminations of competitors who could claim to be meeting respondent's prices.[56] Rather than concerning itself with the mere "availability" of lower prices from Gulf, Texas, or Shell, the decision below expressly rested on evidence showing that "at different times" respondent "reduced its price to meet *competitive offers* in order to retain a customer" (R. 5501). But this record contains *not a single instance where respondent bid for a competitor's account with discriminatory price offers.* Because on the instant record, therefore, no rival supplier could show that its discriminatory prices were necessitated by any competitive offers on respondent's part, it could afford

[56] There is even less warrant for counsel's extravagant statement that "deeply entrenched" price discriminations in entire industries can gain immunity by what the "decision below apparently holds" (Br., pp. 51, 52).

no competitor an opportunity to justify *his* price differential as meeting respondent's offers.[67]

D. The Geographic Pricing Cases, Condemning Industry-Wide Systematic Discriminations, Are Not in Point.

The decisions which invalidated geographic pricing systems, cited as dispositive by the Commission's brief (pp. 26-34), cannot support counsel's argument. The Statement of Commission Policy Toward Geographic Pricing Practices nine years ago called attention to the economic and legal "peculiarities of the problems of geographic price differences," disclaimed any reliance "upon analogy to concepts elsewhere" in price discrimination cases, and concisely differentiated counsel's key precedents from the issues at bar. Significantly, the Commission's lengthy Statement did not include the instant proceeding in its case-by-case survey of the legal problems raised by such pricing systems. On the contrary, a footnote citation distinguished this case in describing the Commission's then pending efforts to obtain a judicial ruling as to whether a price discrimination creating the statutory "injury" was "*nevertheless lawful if it arose by meeting competition in good faith.*"[68]

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67. Accordingly, the court below properly refused to speculate as to the effect of its ruling on other cases, and remarked that "it will be time enough to cross that bridge when it is reached" (R. 5502).

68. 4 CCH Trade Reg. Rep. 5341, 5346 n., 5350 (1948). The principal cases cited by counsel, *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945); *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948); *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419 (1957), were explained by the Commission in 1948 as follows:

> (1) In *Staley*, "the seller was not only systematically absorbing freight in certain localities but also matching prices with others in all localities, charging phantom freight in certain localities, and displaying obvious indifference to the question whether or not competition was actually encountered at

In sharp contrast to the intense competition that resulted in reduced individual prices in the Detroit gasoline market in the 1930s, this Court's *Staley*, *Cement Institute*, and *National Lead* decisions concerned industry-wide discriminatory plans conceived in collusion to stabilize an entire price structure. A far cry from respondent's price reductions in four isolated instances over the years to retain choice customers against price raids of aggressive competitors, those cases dealt with the maintenance of industry freight formulas which insured price uniformity among all sellers and minimized competitive solicitations on account of price. None of those industry pricing systems did, or could conceivably, contemplate a single seller's defensive efforts to retain individual customers against competitors' price attacks.[69]

particular points where it was supposedly met." 1 CCH Trade Reg. Rep. at 5351.

(2) In *Cement Institute*, "the proof was that discrimination had been inherent in the collusive abandonment of competition," so that it was "consequently impossible to show that this same discrimination consisted merely in meeting competition." *Ibid.*

(3) In *National Lead*, "the heart of the complaint is a charge that the respondents participated in a broad price fixing conspiracy" and "the charge of price discrimination was based upon conspiracy by the defendants to establish price differentials between zones and to maintain uniform delivered prices within each zone." *Id.* at 5347-48.

From its analysis, the Commission concluded that "it appears improbable that the defense of meeting competition can be successfully offered in cases involving systematic matching of delivered price quotations through single or multiple basing point systems or the more complicated types of zone price systems." On the other hand, the Commission declared—years prior to this Court's 1951 decision in the instant case—that the "courts appear to have assumed, though the point has not been squarely decided, that a single seller has a substantive right in good faith to meet the equally low price of a competitor in individual transactions." *Ibid.*

Needless to add, conspiratorial or collusive practices were never alleged by the Commission, let alone found, in the case at bar.

In *Staley*, the respondent sought to justify under Section 2(b) by claiming that its adoption of the Chicago-plus-pricing system pioneered by the Corn Products Refining Company constituted good faith meeting of a competitor's equally low price. But Staley had not *lowered* any prices to its nearby customers even when it enjoyed freight advantages over its rivals. As this Court observed, "Instead they maintained their own prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, by including phantom freight in their own delivered prices." 324 U. S. at 753 (1945).

The Court rejected the *Staley* defense because it did not show "the establishment of a 'lower price'" in response to an "individual competitive situation," but rather amounted to a wholesale adoption of an industry-wide uniform pricing system designed for "establishing an artificially *high* price" throughout the industry. *Id.* at 756.[70]

This interpretation of Section 2(b) was reaffirmed by the *Cement Institute* decision which condemned an industry-wide basing point system. 333 U. S. 683, 713 (1948): "A handy instrument to bring about elimination of any kind of price competition," it resulted in cement being sold "in every given locality at identical prices and terms by all

69. Both *Cement Institute* and *National Lead* found price-fixing conspiracies in alternative counts. 333 U. S. at 713, 352 U. S. at 422. In *Staley* and its companion *Corn Products* proceeding, the Commission later issued orders based on uncontested charges of price-fixing conspiracy through concerted employment of the same delivered pricing system. *Corn Products Refining Co., et al.*, 47 F. T. C. 587 (1950).

70. The Federal Trade Commission's General Counsel restated the holding of *Staley* thus: "In condemning a system which attached 'phantom freight' to certain sales, the Court held, positing the defense's availability in certain instances where prices were *lowered*, that it could not prevail in situations where prices had been *raised*." (Emphasis in original.) Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N. Y. U. L. Rev. 1143, 1165-66 (1955).

producers." *Ibid.*[71] The Court reaffirmed that Section 2(b) is concerned with "the seller's 'lower' price" and "places emphasis on individual competitive situations, rather than upon a general system of competition." *Id.* at 725. Hence it could not sanction "the employment of the multiple basing point system by the respondents as a practice rather than as a good faith effort to meet 'individual competitive situations.'" *Ibid.*

In *National Lead* the industry had adopted a zone pricing system providing for identical zones and uniform variations from the base price of lead pigments. The "highly artificial" zone boundaries sometimes led to "bizarre results" when purchasers nearer a plant paid high prices than more remote customers, 352 U. S. 419, 422, 424 (1957).[72] This Court sustained the Commission's order, drafted to thwart resumption of the old "pattern of collusion," which also prohibited all zone price quotations by an individual seller "systematically matching" all the delivered prices of rivals. *Id.* at 423, 425. This limited ban on "(1) *identical prices* with competitors (2) resulting from zone delivered pricing" was held to preserve for each seller all rights under the meeting competition proviso, since Section 2(b) was "designed to protect competitors in individual trans-

71. According to the Court, "thousands of secret sealed bids have been received by public agencies which corresponded in prices of cement down to a fractional part of a penny." *Ibid.* Contrast this with the range of offers by competitors to respondent's customers.

72. The contrary is the case where, as here, the lower prices take account of the customer's performance of costly distributive functions. See, *e. g.*, Adelman, *Integration and the Antitrust Laws*, 63 Harv. L. Rev. 27, 63 (1949): "Standard was selling its retailer customers gasoline plus storage plus delivery. It was selling the jobbers gasoline net of these services. Unless it charged these two classes of buyers different prices, it would be discriminating against the jobbers." A practice whereby suppliers sought to avoid reflecting in their prices the economies of functional "integration" was an important element in the restraints of trade condemned in *Sugar Institute v. United States*, 297 U. S. 553, 588-89, 594-95 (1936).

actions" but did not justify "the use of an entire pricing system." *Id.* at 426, 431.

Indeed, the Court has already distinguished the *Geographic Pricing* decisions. In comparing its earlier holdings in *Staley* and the companion *Corn Products* case, the Court's previous opinion in this case noted the "contrast to that factual situation" presented by this record (R. 5315). The *Staley* holding was considered not to alter "the assumption, applicable here, that if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers then the seller is protected, under § 2(b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price" (R. 5315). And the Court compared the rejection of the Section 2(b) defense in those cases owing to "insufficiency of the seller's evidence" with the fact that "the Trial Examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense." *Ibid.*

IV.

THE COMMISSION'S FAILURE TO CHALLENGE THE LAWFULNESS OF THE COMPETITIVE OFFERS CONFIRMS THEIR LEGALITY.

Despite the opportunity afforded by this Court's remand in 1951, the Commission majority's post-remand findings, both as proposed in 1952 and as promulgated in 1953, did not question the legality of the offers met by respondent (R. 5336, 5354, 5364-90). The decision below stated that "in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which [respondent] met were lawful" (R. 5501). Furthermore, the

Commission's brief concedes that respondent need not prove the lawfulness of its competitors' prices.[73] Notwithstanding this concession and in the face of the Commission's deliberate failure to make such a finding, counsel gratuitously insinuate illegality (Br. 36).[74]

The legality of the competitive offers met by respondent was before this Court on the prior review. The Court's opinion observed that respondent "presented evidence tending to prove that its tank car price was made to each 'jobber' in order to retain that 'jobber' as a customer and in good faith to meet a *lawful* and equally low price of a competitor" (R. 5311), and referred to the failure "to make findings of fact where evidence is offered that the prices met by the seller are *lawful* prices and that the meeting of them is in good faith" (R. 5319 n.). Finally, in distinguishing *Staley*, the Court referred to "the assumption, applicable here, that if a competitor's 'lower price' is a *lawful* individual price offered to any of the seller's customers," the meeting of such a price in good faith was protected by Section 2(b) (R. 5315).[75]

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73. That concession accords with *Standard Oil Co.* v. *Brown*, 238 F. 2d 54 (5th Cir. 1956), and the Commission's own Initial Decisions in *C. E. Niehoff & Co.*, Dkt. 5768, and *E. Edelmann & Co.*, Dkt. 5770, affirmed in *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957) and *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956).

74. In connection with the lawfulness question, the Commission's brief asserts that the Commission does "not have the burden of proving the *unlawfulness*" of the prices met, but urges that the identical "pricing policies" of respondent's competitors "suffer from the same infirmities" as respondent's prices (p. 36). See also Reply Br. in Support of Pet., p. 4 n. 1.

75. One Justice remarked in the oral argument as to the rival offers met by respondent that "if it is not shown that they were illegal, you can assume that they were legal." Transcript of Oral Argument, October 9, 1950, p. 74.

Cf. also the immediately preceding colloquy between Mr. Justice Burton and FTC counsel:

> "Mr. Justice Burton: In this case we are assuming these competitive offers from the other companies are legal offers,

In oral argument, Commission counsel had conceded that equally low prices were available to respondent's four customers from "at least five major companies," but had alluded to pending proceedings against three of those rivals. (Transcript, pp. 71-78). The Court at the close of the argument requested a special memorandum regarding those cases (*Id.* at 137-38). As filed by the Commission on October 13, 1950, this document cited the pendency of price discrimination complaints against Gulf, Texas, and Shell—three of the numerous Detroit competitors which had bid for respondent's four jobber customers (pp. 32-38, *supra*). Perhaps in cognizance of those cases, the Court's opinion directed that "There Should Be a Finding as to Whether or Not Petitioner's Price Reduction Was Made in Good Faith to Meet a *Lawful* Equally Low Price of a Competitor" (R. 5311).

Upon the remand and on the same record, the Commission majority took the initiative in issuing findings invalidating respondent's meeting competition defense on other grounds, without mention of the "lawfulness" issue (R. 5336).[76] This was done despite respondent's prompt request for a finding that its price reductions were made in

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is that not true? It has not been raised anywhere in the oral arguments or briefs that they are unlawful offers, as I understand it. * * *

"No point is being made against Standard in this case that they were not lawful offers that they could not meet under the statute.

* * * * *

"Is the Commission objecting to Standard's conduct on the ground that it was trying to meet an illegal offer?

"Mr. Cassedy: No, sir. It is not basing it upon that ground."

Id. at 72-73. A similar colloquy between Mr. Justice Frankfurter and Commission counsel ensued, *id.* at 77-78.

76. The Commission ignored staff counsel's contention that respondent must affirmatively demonstrate the lawfulness of its competitors' prices. (Brief of Counsel Supporting the Complaint, pp 10-11).

good faith to meet a competitor's lawful equally low price "as called for by the mandate of the Supreme Court" (R. 5354).[77] On the other hand, the author of the minority opinion, expressing the views of two Commissioners, felt "satisfied that there is nothing in the 8,000 pages of evidence in this record which might cause me to suspect that respondent knew, or that it had reason to believe, that the competitor's lower price which it was meeting was or might have been unlawful" (R. 5399, 5420). Accordingly, the minority Commissioners proposed a finding that "The respondent's price reduction was made in good faith to meet a *lawful* equally low price of a competitor" (R. 5421).

The deliberate failure of the Commission majority to impeach the legality of the competitive offers surely precludes any further challenge here. This is especially so since the three proceedings placed before the Court by the Commission's Memorandum on October 13, 1950, were dismissed by the Commission on April 3, 1957, on motion of its staff in 1955.[78]

Furthermore, this Court's recent *Automatic Canteen* opinion declared that "antitrust policy and the ordinary requirements of fairness" dictate that no businessman should be charged with knowledge that price differentials, without more, are illegal.[79] The rationale of *Automati*

77. The Commission declined to grant respondent's request for a hearing until *after* it issued its proposed findings which it later promulgated (R. 5336, 5341-44, 5359).

78. The three dismissed complaints in no event can supply retrospective inferences of illegality concerning the prices met in the 1930s by respondent as to these three, let alone the offers from the numerous other competitors. Moreover, recent Commission Initial Decisions held that no presumption of illegality as to a respondent or his competitors' prices could arise from the mere subsequent filing of a Commission complaint. *E. Edelmann & Co.*, Dkt. 5771 (May 10, 1955); *C. E. Niehoff & Co.*, Dkt. 5768 (May 17, 1955).

79. *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 81 (1953). The Court did "not think that price differentials, even as a matter of uncritical impression, come so often with

Canteen,[80] requiring the Commission to go forward with any evidence as to unlawfulness, is *a fortiori* applicable here.[81] Thus, even though a respondent may have the burden of *proof* to establish every statutory element of the Section 2(b) defense, the legality of the prices met is assumed at least until the Commission *comes forward* with some record evidence indicating otherwise. Cf. *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 302 (1930).

Here the Commission has declined even to notice the issue, notwithstanding this Court's remand. Consequently, the legality of the competitive offers must now be deemed confirmed, once and for all. Cf. *Federal Trade Commission* v. *Curtis Pub. Co.*, 260 U. S. 568, 580 (1923).

Even so, respondent was always prepared to show that the record amply supported its requested findings of lawfulness of the relevant offers. In the case of most, the Commission itself would not regard them as subject to the Robinson-Patman Act. The products of Phillips (Phillips 66), Standard of Ohio (Fleet Wing), Pure Oil Co. (Hi-Speed) and Ohio Oil Company (Linco, Marathon) were offered by local Michigan distributors.[82] National Refining Co. offered gasoline at a single uniform price in Detroit (R. 1949-50). And Aurora, which aggressively solicited re-

the prohibited range of price discriminations" as to warrant such knowledge on a businessman's part. *Id.* at 71.

80. That case concerned the buyer's knowledge as to the legality of his own supplier's prices.

81. For a seller in meeting his competitors' prices in good faith ordinarily cannot foretell their ultimate legality, which may depend on a host of factors and years of litigation, and should not be forced by the Commission into price and cost discussions with his competitors. Such collaboration, the Court observed, might "offend other antitrust policies." *Id.* at 69.

82. The Commission has consistently taken the position that distributors who resell within a state gasoline purchased from an out-of-state refinery are not subject to the Robinson-Patman Act. See S. Rep. 2817, 84th Cong. 2d Sess. 21-22 (1956).

spondent's customers, was a local refiner selling wi
the state products made from Michigan crude oil (R. 1
52, 1354-56, 3058-59).[83]

V.

THE COMMISSION'S "COST JUSTIFICATION" AND "C PETITIVE INJURY" GROUNDS FOR VITIATING MEETING COMPETITION DEFENSE ARE LEGA UNTENABLE.

Besides properly setting aside the factually unsuppo
contention that respondent's prices were granted purs
to a "system," the Court of Appeals correctly disappr
the Commission's additional legal grounds for reje
respondent's meeting-competition defense.[84]

A. Cost Justification Cannot Affect the Alternativ Meeting Competition Defense.

The Court of Appeals held "irrelevant" to the me
competition defense the Commission's finding that resp
ent "knew or should have known" that the lower pric
the four customers "could not be justified on the bas
differences in the cost of manufacture, sale and deliv
(R. 5499).

In judging the legal sufficiency of respondent's me
competition defense, cost considerations are entirely b
the legal point. The court below correctly observed
cost justification and meeting competition are

83. In 1940 alone, Aurora sold between 40 and 50 millio
lons in the area. Its product, represented as of a higher
rating than respondent's gasoline, was considered seriously
spondent's customers (R. 1147-52, 1308, 2013).

84. These prime elements in the Commission majority's d
are now minimized as "ancillary" and "subsidiary" by
(Reply Br. in Supp. of Pet., p. 8 n. 7; Br., p. 56), notwithst
one majority Commissioner's subsequent characterization
injury finding as the key factor in the post-remand ruling. S
18 *supra*.

independent statutory defenses under Section 2 of the Act. The fallacy underlying the Commission's doctrine was exposed by one of the Justices during oral argument on this Court's previous review:

> "What good is it if they must justify the cost? Why waste time on the good faith?
> "If good faith is not enough, if it requires cost, then what purpose does this section have in the statute?"[85]

On the other hand, if the Commission were correct in asserting that cost justification has some bearing on the "good faith" of a seller in meeting competition, respondent's good faith would be confirmed by its policy of refusing to give its tank car price, even when necessary to meet a competitor's lower offer to an established account, unless the customer assumed certain costly distributive functions. For, as this Court's opinion also observed (R. 5309), obvious cost economies accrued to respondent in serving tank car customers. The only question concerned the precise amount of the saving.[86]

This proceeding began as a "pioneer case" in cost justification under the Act (R. 5068, 5081). Respondent's extensive cost studies, whose good faith was conceded, were rejected by the Commission on unforeseeable and complex grounds (R. 5171-78, 5374-82, 3771-72).[87] In view of the shifting content of costs in competitive pricing and the elusive nature of a statutory cost justification, as recently

85. Transcript of Oral Argument, October 9, 1950, p. 112.

86. Independent studies established that the typical distribution cost between wholesaler and retailer is between 1½¢ and 2¢ per gallon. 2 Bain, *The Pacific Coast Petroleum Industry*, pp. 222-27 (1945), cited in Adelman: *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 64 (1949).

87. "The development of satisfactory bases of allocation has been the most difficult problem in analyzing distribution costs." Note, *Proof of Cost Differentials Under the Robinson-Patman Act*, 65 Harv. L. Rev. 1011, 1014 (1952).

acknowledged by this Court,[88] respondent surely could not be charged from the outset with knowledge that the Commission's accountants might later disagree with its estimated cost savings.

B. The Meeting Competition Defense Is Unaffected by Findings of Competitive Injury.

Likewise, the Court of Appeals correctly held respondent's meeting competition defense unaffected by the Commission's finding that respondent "knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought such gasoline at different prices and resold it in competition with one another" (R. 5498-99).

The Court of Appeals accurately perceived that this was "the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court" (R. 5499). This Court previously reversed the Commission's contention that a finding of competitive "injury" made the defense "not material" and procedurally "unavailable" (R. 5179, 5182). For unless the Commission itself first proves competitive "injury," a Robinson-Patman Act proceeding must be dis-

88. This Court commented on "the intricacies inherent in the attempt to show costs in a Robinson-Patman Act proceeding," and concluded that "Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost justified." *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 68-79 (1953).

The then Chairman of the Federal Trade Commission has also observed: "Cost accounting is by no means an exact science. Methods of allocation and proration of distribution costs are in the evolutionary stage. * * * In none of the cases * * * has the Commission established adequate guiding principles or precedent for cost analysis * * * [T]here are no rules of the game." *Sylvania Electric Products, Inc.*, FTC Dkt. 5728, pp. 5, 6 (Oct. 27, 1954).

missed for want of a prima facie case.[89] Thus, if competitive "injury" defeats the meeting competition defense, that proviso is wholly useless. *Without* competitive "injury" there would be no violation anyway—regardless of the defense; and *with* such "injury," the defense would fail.

In now impugning a meeting competition defense on the merits by reason of competitive "injury",[90] the Commission would—by a purely verbal change—resurrect the prior interpretation which this Court rejected as making Section 2(b) of "such little, if any, applicability as to be practically meaningless."[91]

C. No Genuine Competitive Injury Appears in This Case.

Finally, this case does not factually disclose any competitive "injury" cognizable under the Robinson-Patman Act.[92] Proof of the meeting of competitors' equally low prices to retain a customer rebuts any "injury" attribut-

89. *E.g., General Foods Corp.*, FTC Dkt. 5675 (April 27, 1954).

90. Although playing down the importance of this aspect of the majority findings against respondent, the Commission's brief stresses the knowledge respondent should have had as to the injury created by its prices (p. 57). But if actual injury findings are immaterial, as held by this Court in 1951, imputed knowledge as to this same injury could have no greater bearing on the meeting competition defense. The *Staley* decision, as quoted by this Court, expressly recognized the availability of that defense to a seller "who has knowingly discriminated in price." 324 U. S. at 759; R. 5317. In any event, since respondent never granted a lower price unless it knew that the same or still lower prices were at all times available to the customer, it could surely not be charged with knowingly causing competitive injury when the customer was bound to get equally low prices, anyway.

91. (R. 5320.) "Hence, by a narrow interpretation of 'good faith,' the Commission succeeded in obtaining the same result which had been sought in its 'procedural' arguments before the Supreme Court." Comment, *The Meeting Competition Defense Under Section 2(b)*, 49 Northwestern L. Rev. 261, 263, n. 11 (1954).

92. Since the meeting competition defense concerns the rebuttal of a *prima facie* case of injurious discrimination, the injury issue is not closed until that defense is finally adjudicated.

able prima facie to the respondent seller's differential, for it demonstrates that the same low prices were first offered to the same customers by other suppliers. In that event, the respondent's defensive counter-move cannot be held to cause any "injury" within the contemplation of the law.

Since on this record respondent's four customers could at any time have accepted lawful competitive offers at prices as low or lower than respondent's tank car price, the competitive situation on the dealer level would be the same—whether or not respondent met its competitors' prices. Disabling respondent from granting its tank car price would have merely shifted the customer's business over to another of the many Detroit suppliers.[93]

Judge Hansen, Chief of the Antitrust Division of the Justice Department, recently stated in testimony before Congress concerning the issues of the instant case: "The injury wasn't done by the lowering of the seller in good faith, the injury was done by the competitor that came in and offered to sell to his customer at a lesser price."[94]

93. See pp. 32-38, 55 *supra;* and R. 5104, 344-45, 371-74, 947, 971, 1018-19, 1062-63, 1086, 1092, 1093, 1118, 1127, 2097. According to the Commission's own chief witness, therefore, "it would not in any way cure or help to cure this competitive situation" if respondent's customers would simply transfer to other suppliers (R. 345).

This Court appropriately observed that "it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller" (R. 5320).

94. Judge Hansen summarized the situation in this case as follows: "We have four dealers that are all paying an equal price from one seller. The competitor comes in and goes to one of them and says, 'I will sell it for two cents less.' The damage certainly is done to the other three by virtue of their competitor getting it for two cents less, the damage is not by the original seller coming back and saying, 'I will sell it to you for the same amount that my

Furthermore, respondent's reductions to its four customers were minimized to the extent these were required to perform their own bulk storage and transportation.[95] No customer receiving the 1½¢ per gallon lower tank car price ever received a *net* price concession in that amount. While the record does not clearly show the precise benefit remaining for the customer after his expenditures for jobber facilities and equipment, that amount was obviously quite small. Accordingly, an impartial study of this case concluded that "any cutting of price with its consequent effect upon competition would be 'caused' not by the discount received but by the integrated retailer's willingness to operate at a lower profit margin."[96]

competitor has offered it to you for.' So the seller acting in good faith wouldn't be the one causing the damage, the damage would be caused by the other competitor." *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 85th Cong., 1st Sess. 843 (March 1957).

95. This factor differs from the statutory cost justification defense which relates only to seller's own costs that need not coincide with the costs incurred by a customer in performing a distributive function. See Note, 67 Harv. L. Rev. 294, 303-4 (1953); and notes 64 and 86 *supra*.

Thus, a detailed analysis of Citrin's operations revealed an average resale cost of 1.48¢ per gallon in the years 1937-1940, ranging from 1.3¢ in 1937 to 1.53¢ in 1940 (R. 1771). Comparable costs for Wayne averaged 1.43¢ per gallon between 1938-1940, but this evidence was stricken (R. 5154, 1234-39). Ned's resale costs were doubtless smaller, since its overhead was spread over a general merchandising business covering tires, small and major household and electrical appliances, sporting goods, radios and hardware, which were sold in conjunction with gasoline at its six retail outlets (R. 5109-10, 1799).

The contrary assertions by the Examiner (R. 5123) are obviously incorrect (R. 5147, 1771, 228).

96. Note, *Functional Discounts Under the Robinson-Patman Act: The 'Standard Oil' Litigation*, 67 Harv. L. Rev. 294, 303 (1953). According to this study, "The dealers who received a discount from Standard Oil were 'integrated retailers' in that they performed wholesaling functions for themselves, such as receiving delivery in large quantities, maintaining storage facilities, and delivering to the retail stations. If the discount received by

VI.

THIS COURT SHOULD ACCEPT THE CONCLUSION BELOW THAT RESPONDENT'S DEFENSE WAS "FIRMLY ESTABLISHED" BY THE RECORD.

A. Universal Camera Sustains the Reversal of the Divided Commission, in Light of the Examiner's Findings Confirmed by the Dissenting Commissioners' Independent Appraisal.

The court below in setting aside the Commission's key "system" contention as unsupported by the evidence acted entirely within the bounds of this Court's *Universal Camera* decision,[97] and its review of the record should not be duplicated here.

According to *Universal Camera*, the Administrative Procedure Act's directive that agency findings be supported

the integrated retailers is no greater than his additional costs on the wholesaling operations, it seems clear that the discount would have no effect on competition among retailers." *Ibid.*

Actually, the sole proof as to adverse competitive effects on this record consists of complaints about gallonage losses by a handful of Detroit service stations. The only two recipients of respondent's lower prices charged with price cutting in many instances did no more than meet the cut prices of other stations amid a general price war and "demoralized retail situation" (R. 5112, 5116, 1783-91, 1843-59). Even then the sole injury to respondent's dealers found by the Examiner related to their "being forced to meet the cut-rate prices which resulted in increasing their volume but not their profits" (R. 5114). At the same time, the record reveals concerted efforts of dealers, under the aegis of the local gasoline retailers association, to agree upon retail prices (R. 161, 593, 597, 1784, 1870, 1877-78, 1905, 2125). Although the extent is not clear from the record, these attempts to fix artificial prices obviously caused a loss of business on the part of these dealers (Cf. R. 461-62).

97. The court below had some doubts as to its power to set aside the administrative findings, due to its understanding of this Court's *Staley* decision (R. 5496). But under the broader review standards established subsequent to *Staley* by the Administrative Procedure Act, as explained by this Court's historic *Universal Camera* decision, the court's reversal of the Commission action was obviously correct.

by "substantial evidence" requires that "substantiality be determined in the light of all that the record relevantly presents." 340 U. S. 474, 488 (1951). And since Congress sought to "increase the importance of examiners in the administrative process," an agency ruling becomes less persuasive when a different result was reached by an "impartial, experienced examiner who has observed the witnesses and lived with the case." *Id.* at 495-96. Above all, "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." *Id.* at 490.

The decision below properly reviewed the "record as a whole," including those parts detracting from the Commission majority's ruling. The court gave "the examiner's report such probative force as it intrinsically commands" (*id.* at 495) in confirming the evidence that respondent's prices were reduced to individual customers to retain their business and were "at all times" granted "to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality", rather than pursuant to a pricing system (R. 5104).[98] The court also noted that two dissenting Commissioners sustained the Examiner's findings on the basis of an independent reappraisal of the evidence (R. 5496).[99]

98. The Examiner's findings here at issue rested heavily on his appraisal of the oral testimony (R. 5052, 5094-95, 5100-4).

The Commission now belittles the Examiner's report as "only advisory" because filed in 1943 prior to the Administrative Procedure Act (Br., p. 24, n. 11). But the Commission's post-remand evaluation of this record in 1953, here at issue, is governed in all respects by the standards of the APA. *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 500 (1951).

99. On judicial review of an agency's rulings, the "wide difference of opinion among the members may suggest doubts as to some basic findings of fact." *Baltimore & O. R. R. Co.* v. *United States*, 298 U. S. 349, 362 (1936); see also *Labor Board* v. *Ohio Calcium Co.*, 133 F. 2d 721, 724 (6th Cir. 1943); *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786, 789 (7th Cir. 1951).

Accordingly, the Court of Appeals in setting aside the Commission majority's ruling properly applied the guiding criteria established by this Court for the review of agency action.

B. This Court Will Not Supplant the Court of Appeals as the Initial Reviewer of Administrative Action.

The force of *Universal Camera* can hardly be escaped by counsel's effort to disregard the review below in favor of a direct review by this Court of the administrative findings.[100] The Commission's argument gives scant recognition to the unanimous decision of the Court of Appeals, and in effect urges this Court to weigh the Commission's actions against the evidence *ab initio*.

But this Court has consistently refused to bypass the intermediate reviewing court in order to undertake an initial review of findings by administrative bodies. "Congress has charged the Courts of Appeals, not this Court, with the normal and primary responsibility" for reviewing the actions of administrative agencies in the first instance. *Labor Board* v. *American Insurance Co.*, 343 U. S. 395, 409-

100. In seeking review here, Commission counsel obscured the *Universal Camera* rule by labeling the system issue a "law" rather than a "fact" question (Reply Br. in Supp. of Pet., p. 5). The *existence* of a pricing "system" motivating respondent's prices is obviously a factual issue. The legal issue—whether such a "system," *if extant*, could be justified under the meeting competition proviso—is hypothetical unless there *is* a system. The court below concluded from the record that there was no system, and Commission counsel now disagree with that factual evaluation (Br., pp. 37 *et seq.*).

In this connection, the Chairman of the Federal Trade Commission has twice declared that "the seventh circuit court in the recent Standard Oil decision was passing on a purely factual matter and neither added to nor subtracted from the law laid down by the Supreme Court in 340 U. S. 231." Statement of the individual views of Chairman John W. Gwynne in *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess. 233 (1956); 85th Cong., 1st Sess. 634 (1957).

410 (1952).[101] When administrative findings are set aside by the reviewing court as unsupported, this Court will "do no more than decide" whether there was a "fair assessment" of the record. *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502-3 (1951). For "whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491 (1951).

Controlling here is this Court's unanimous affirmance of the Court of Appeals in *Federal Trade Commission* v. *American Tobacco Co.*, 274 U. S. 543 (1927): "The statement of the petition for certiorari that the judgment and opinion below might seriously hinder future administration of the law was grave and sufficiently probable to justify issuance of the writ." However, after argument and scrutiny of the issues, the Court perceived that "Proper decision of the controversy depends upon a question of fact," as to which the Commission's finding in the affirmative was set aside as unsupported by the Court of Appeals. *Id.* at 544. Although this Court believed that "The opinion of the Circuit Court of Appeals is of uncertain intendment and is not satisfactory as an exposition of the law,"[102] it unanimously affirmed the judgment by following "the usual rule of non-interference where conclusions of circuit courts of appeals depend on appreciation of cir-

101. See also *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 365 (1955); *Labor Board* v. *Electrical Workers*, 346 U. S. 464, 478 (1953) (dissenting opinion).

102. Counsel's quarrel with the opinion below at most concerns some ambiguous dicta suggesting that pricing "systems" when not intrinsically illegal may be justifiable under the meeting competition proviso (Br., pp. 33-36). Compare *Laudor* v. *National Screen Service Corp.*, 352 U. S. 992, 995 (1957) (dissenting opinion).

cumstances which admit of different interpretations" *Id.* at 544.

Adherence to this "usual rule of non-interference" is *a fortiori* indicated in the instant case, where the factual conclusions of the court below are corroborated by the persuasive findings of the Hearing Examiner and two minority Commissioners.[103]

CONCLUSION.

The basic issue confronting the Court today is the same as on the first review of this case seven years ago: Whether the Robinson-Patman Act preserves the fundamental freedom of sellers in a competitive economy to meet realistically the prices of their competitors. To ensure effective competition, sellers must react promptly to the price moves of their rivals, and cannot postpone pricing responses pending lengthy accounting and legal studies. Now as before, the unnatural restrictions on pricing flexibility advocated by the Commission foster the very price rigidity that the antitrust laws proscribe. Yet, as this Court's prior opinion in this case declared, "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor" (R. 5319).

"Even if the Commission has, by virtue of the Robinson-Patman Act, been given some authority to develop policies

103. That principle was recently reiterated in *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503 (1951) where the Court unanimously affirmed a Court of Appeals decision which, as here, had set aside an agency ruling upon remand from this Court's reversal of an earlier erroneous legal interpretation. The opinion declared that this Court was "not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." See also *Labor Board* v. *American Insurance Co.*, 343 U. S. 395, 416 (1952).

in conflict with those of the Sherman Act in order to meet the special problems created by price discrimination," this Court recognized its overriding "duty to reconcile such interpretation * * * with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 74 (1953).

Respondent respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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